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It was intended to have included the Appendix of Forms and Bills of Costs in the second volume of this work, but it was found that its size would be inconveniently increased. The residue of the Appendix and a selection of Bills of Costs will be shortly published, so as to form, with that part of the Appendix already published, a separate volume.

A TREATISE

UPON

THE PRACTICE

OF THE

COURT OF CHANCERY;

WITH AN

APPENDIX OF FORMS.

BY MURRAY HOFFMAN, ESQUIRE.

IN TWO VOLUMES.

VOL. II.

NEW-YORK:
HALSTED & VOORHIES,
Corner of Nassau and Cedar Streets.

1839.

Entered according to act of Congress, in the year 1839, by the Author, in the Clerk's Office of the District Court of the Southern District of New-York.

William Osborn, Printer,
88 William-street.

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ERRATA, &c.

Page 90, last line, for "Executors," read "Executions."
" 112, for "Sandford," read "Sanford."
" 120, line 10, for "or more," read "and more."
" 139, n. 5, for "p. 79," read "No. 79, p. 111."
" 141, See Addenda, No. 3.
" 144, subd. 11, after the word "New-York," insert "or in any other city in which a daily paper is printed."
" " after the word "partition," on the 7th line from the bottom, insert "except in cities where a daily paper is printed."
" 145, n. 2, for "*Famar*," read "*Farnam*," and for "619," read "614."
" 147, See Addenda, No. 4.
" 149, See Addenda, No. 5.
" 185, 6th line from bottom, for "bills," read "wills."
" 193, n. 1, for "323," read "328."
" " line 5, for "promoted," read "prosecuted."
" 207, line 7, for "where," read "whose."
" 208, n. 1, for "Council," read "Counsel."
" 269, line 6, for "He," read "They."

Page 121, last line, the decision in Wakeman *v.* Russell has been overruled.

CHAPTER 23.

CORRECTION OF A DECREE IN THIS COURT AFTER ENROLMENT.

SECTION I.

BY PETITION.

CLERICAL errors, or those of form apparent upon the face of the decree or the schedules to a report, may be corrected by petition even after enrolment; as may also a decree obtained by surprise.(1) The general rule is, that a decree regularly obtained and enrolled cannot be altered but by bill of review;(2) yet it appears that if obtained by default, the court will vacate

---

(1) *Weston* v. *Haggersten*, Cooper's Cas. 134. The master had made a mistake in the schedules to his report, by wrongly adding up the balances; by which the defendant was charged £7000 more than he ought to have been. Upon further directions the defendant was ordered to pay this amount. The plaintiff then enrolled the decree, and the mistake was afterwards discovered. The question was whether the mistake could be rectified on a summary application to the court, or whether a bill of review was not necessary. The Lord Chancellor said that all errors apparent on the face of schedules could be rectified even after enrolment, but that there could be no corrections except of such apparent errors, and that the mistake in the schedules might be rectified.

Stevens v. *Guppy*, 1 Turner & Russ. 178. The Lord Chancellor vacated an enrolment of a decree upon the ground of the party enroling it having said that which had led the other party to believe that it would not be enrolled.

Kemp v. *Squire*, 1 Vesey, Sen. 205 and cases. See also *Barnes* v. *Wilson*, 1 Russ. and Mylne, 486, and *Balguy* v. *Chorley*, 1 Mylne and Keene, 640.

(2) *Bennet* v. *Winter*, 2 Johns C. R. 205.

the enrolment in a case in which a decree by default will be opened.(1)

In a case in which there had been a decree for the sale of real estate upon a creditors bill, and the purchasers objected to take the title because judgment creditors of the devisees were not made parties, leave was given to file a supplemental bill for the purpose of bringing them in; and an order was made setting aside the decree and vacating the enrolment.(2)

In a case before the vice-chancellor of the first circuit a decree had been made for the partition of certain premises. The commissioners made their report and a decree was made and enrolled for making the partition effectual, &c. A certain parcel of ground contained in the bill and decree for partition, had been taken into consideration by the commissioners in their allotment, and in their abstract was set apart to one of the parties; but by mistake the parcel was omitted in their report, and of consequence in the final decree. A supplemental report of the commissioners stating these facts was obtained, and on petition an order and decree was made that the allotment of such parcels to J. A. K. and M., his wife, be deemed binding and effectual between the parties, that such parcels be held in severalty by the said J. A. K. and wife, and that such report and petition be annexed to the enrolment of the decree, and that the present decree be enrolled and annexed thereto. See the prayer of the petition in this case and the order, Appendix No. 207.

SECTION II.

BILL OF REVIEW.

The leading principles of the court upon the subject of bills of review are contained in an order of Lord Bacon, which has regulated the subject since his time. By the first of his orders no decree is to be reversed, altered or explained, being once under the great seal, but upon bill of review; and no bill of review shall be admitted unless it contain either error in law

(1) *Beekman* v. *Peck*, 3 Johns. C. R. 415.

(2) *Morris* v. *Mowatt*, reported 2 Paige, 586. The above order was made the 31st of October, 1831.

appearing in the body of the decree, without further examination of matters of fact, or some new matter arisen since the decree, and not any new proof which might have been used when the decree was made; nevertheless upon new proof that is come to light after the decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special license of the court and not otherwise.(1)

There are two classes of cases under this order in which a bill of review may be resorted to.

1st. For error of law apparent. 2d. Upon new proof of matters before in issue in the cause. A question has also been made whether it will not also lie upon new matter not before in issue.(2) These will be treated of in their order.

1. In the first case, that of error of law, the mistake must be one of pure misjudgment. It appears to be the rule that such mistake must appear upon the face of the decree; that the proceedings or testimony in the cause cannot be resorted to in order to show an error, unless they are all stated in the enrolment.(3)

1 Error in law.

---

(1) Beames' Orders, p. 1, Lord Bacon's order, I.

(2) *Norris* v. *Le Neve*, 3 Atk. 35. Lord Hardwicke. "There are two sorts of bills of review, one founded on supposed error, appearing in the decree itself; the other on new matter which must arise after the decree, or upon new proof which could not have been used at the time when the decree passed." This seems to make three classes of cases for such a bill.

(3) *Combs* v. *Proud*, 1 Ch. Cas. 55. In drawing up the decretal order, the matter upon which the decree was made was declared proved, which it is stated was not the fact. The bill of review assigned for error certain particulars in which the matters declared proved were not proved. Upon demurrer it was held that the causes of review must arise upon the case as stated in the decree. A rehearing was proper if there was a misstatement or mistake, but not a bill of review after enrolment.

So, in *Mellish* v. *Williams*, 1 Vernon, 166, it was insisted that a decree could be reversed for errors which could be made out by proofs in the cause, though not stated in the decree. But this was utterly denied by counsel and the court. In *Brend* v. *Brend*, 1 Vernon, 213, the Lord Keeper disapproved of drawing decrees without a statement of the facts which were allowed by the court as proved; observing that otherwise a decree could never be reversed by bill of review, but only by appeal.

2
New evidence.

Bills of review may be brought upon the discovery after

However, in *Bonham* v. *Newcomb*, 1 Vernon, 215, to a demurrer to such a bill it was objected, that they had assigned errors collected from the proofs in the cause, that did not appear in the body of the decree. The same Lord Keeper adverted to the wrong mode of drawing decrees without stating the facts proved, and said, that the plaintiff, in a bill of review, should not be concluded by it, unless the matters of fact were particularly stated in the decree.

O'Brien v. *O'Conner*, 2 Ball. & Beat. 146. The error stated was, that devisees of a mortgagor were not made parties in a foreclosure suit. It appears they were devisees in tail, and a purchaser of the reversion from the heir at law was a party. The Lord Chancellor said, "The error in such a case must be an erroneous result drawn by the court from the facts apparent on the record. Neither the attention of the court nor master was drawn to the interest of the devisees, if they had any; nor was there any proof of such interest subsisting, gone into. Consequently no decision was had upon it." He then states the rule as to facts not introduced into the decree, and cites with approbation *Mellish* v. *Williams*, supra.

Perry v. *Phillips*, 17 Vesey, 173, may be also cited to this point. And in our own court the case of *Webb* v. *Pell*, 3 Paige, 368, is very strong. There the Chancellor said it was well settled, that a bill of review for error apparent upon the decree, must be for error in point of law, arising out of facts admitted by the pleadings, or recited in the decree itself, as settled, declared or allowed by the court. Here, the decree of Chancellor Kent recited, that the pleadings and exhibits being read and considered, it was declared and adjudged, that the mortgage in question was held as security for the payment of the bond of E. P. and was a good and valid mortgage in equity. He proceeds: "Now, as I cannot look beyond the decree to ascertain what proof the Chancellor had to sustain that declaration, I am bound to suppose that it was founded on legal evidence, notwithstanding the averment in the bill that no witnesses were examined; as no averment can be received which is not supported by the decree itself."

In *Dexter* v. *Arnold*, 5 Mason, 311, Justice Story clearly recognises the rule as prevalent in England, that you must take the facts to be as they are stated to be on the face of the decree. You cannot look into evidence not set out in the decree.

After noticing, however, that in the courts of the United States the decrees are usually general, he says, "But, for the purpose of examining all errors of law, the bill, answers, and other proceedings, are, in our practice, as much a part of the record before the court, as the decree itself; for it is only by a comparison with the former that the correctness of the latter can be ascertained." In *Ludlow* v. *Kidd*, 2 Hamm. Ohio Rep. 381, it was held, that in a bill of review, the original bill, answers, exhibits and depositions, may be examined, where the decree contains no statement of the facts found or principles decided.

decree of new evidence to matters in issue in the original cause.(1)

It has been decided, however, that it was sufficient if the new proof did not come to the knowledge of the party until after publication, or until after the time, when, by the rules of the court, the party could use it. It was not essential that the new proof should come to his knowledge after the cause was heard.(2) But as by our practice an application may be made at any time before decree to be let in, and take the new testimony upon reasonable grounds, it might form a strong objection to the allowance of a bill of review. See the case of *Hodges* v. *Mullikin*, in the note.

It is not sufficient that the evidence has been discovered after the period prescribed. The bill will not be allowed if the party could have discovered it had he used reasonable diligence.(3)

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(1) Lord Bacon's order before cited. *South Sea Company* v. *Bumpstead*, 4 Vin. Abr. 414. 8; *Taylor* v. *Sharp*, 3 P. Wms. 371; *Standish* v. *Radley*, 2 Atk. 177. The Master of the Rolls. The rule to review and revise a former decree, is the discovery of new matter, since the making of such decree, which was in being at the time, but was not known to the party till afterwards.

(2) *Norris* v. *Le Neve*, 3 Atk. 26. Lord Hardwicke states the rule as in the text. So, *Paterson* v. *Slaughter*, Ambler, 273. *Dexter* v. *Arnold*, before cited. *Livingston* v. *Hubbs*, 3 Johns. C. R. 127. *Hodges* v. *Mullikin*, Bland's Ch. Rep. 511. The Chancellor, after noticing the English rule that it is sufficient if the discovery is after publication, proceeds: "Here a party may at any time, even after the case has been set down for hearing, if the application be made on reasonable grounds, supported by affidavit, obtain a commission to take the testimony wanted. And, therefore, if the new proof comes to light at any time so long before the decree as to enable the party to apply for a commission, he will not be allowed to have the benefit of the rule."

(3) *Blake* v. *Foster*, 2 B. & B. 460. Lord Manners held, that the question as to giving permission to file a supplemental bill in nature of a bill of review, depended upon the same principle as that of filing a bill of review; that the question always was as Lord Eldon had expressed it in *Young* v. *Keighly*, (16 Vesey, 348,) "Not what the party knew, but what, using reasonable diligence, he might have known." All the facts endeavored to be put in issue were as fully known to the defendant before she filed her answer, as they could be at the present time, and it was a want of due diligence that the documents were not made part of the defence.

Livingston v. *Hubbs*, 3 Johns. C. R. 126, is a case strongly illustrative

There is some difficulty in deciding what is the nature of the testimony, the discovery of which will justify the filing such a bill. In some cases it is held, that the testimony must be of record, or at least written.(1) It has been also laid down, that no new proof can be given of a matter in issue in the original cause. But undoubtedly this is erroneous, although there is much reason for saying that the new proof should be documen-

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of the rule. The petition of the defendant to file a bill of review, set forth the discovery since decree of the fact, that several of the witnesses had mistaken the land in question, and had testified as to adjoining land; that others had been fraudulently shown different and inferior land; that he had, since the decree, procured it to be surveyed, and persons had visited it, and it was in fact such as he had represented it to be. [The decree had been against the defendant on the ground of false representations as to the nature and value of the land.] Chancellor Kent said, "there was no newly discovered evidence here, but what might have been had, with ordinary diligence, in the first instance. The defendant might have had the lands surveyed, and viewed, and located, as well before publication passed, as since the decree."

See also *Bingham* v. *Dawson*, 1 Jacob, 244, and *Harvey* v. *Murrell*, Harper's Eq. Rep. 257, in which it was held, that an inventory which might have been procured at the proper office by a search, could not be a ground of such a bill. *Young* v. *Keighly*, 16 Vesey, 338. In *Jones* v. *Pilcher*, 6 Munf. 425, it was determined, that where certain documents, on which the complainant's right to a decree depended, had been lost by counsel, and were not found until after decree against him, the bill could not be sustained. The bill was dismissed, but without prejudice to any suit he might bring to recover back the purchase money alleged to have been paid by him.

(1) *Head* v. *Head*, 3 A. K. Marshall, 121. The court say: "It is well settled that no review ought to be granted of a fact formerly in issue, on account of evidence newly discovered, unless that evidence be in writing, or of record, and does not consist in swearing only. They cite *Resspass* v. *McClanachan*, Hardin's Rep. 342. The court there say, that after the most careful search they cannot find one case reported in which a bill of review has been allowed, on the discovery of new witnesses to prove a fact which had before been in issue, although there are many where bills of review have been sustained on the discovery of records, and other writings relating to the title, which was generally put in issue. The distinction is very material; written evidence cannot easily be corrupted." See also *Bowler* v. *South*, Ibid. 45, and Forum Romanum, p. 186. This point is fully examined, and all the cases cited, in *Dexter* v. *Arnold*, 5 Mason, 313. See also 2 Sumner, 316.

tary.(1) Indeed there are several cases holding that the new testimony must be exclusively to matters in issue in the cause. Upon this point, however, there are opposing decisions.(2)

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(1) *Anon.*, 2 Freeman, 31. "This difference was taken by the Chancellor. When a matter in fact was particularly in issue before the former hearing, though you have new proof of that matter, upon that you shall never have a bill of review. But where a new fact is alleged, that was not at the former hearing, there it may be a ground." *McCracken's Heirs* v. *Finley*, 1 Bibb. 455. "A bill of review does not lie upon discovery of evidence to matters within the party's knowledge before the decree rendered." It appears from the report, that the discovery set up was not new matter, but new evidence to matters within the complainant's knowledge before the decree. See also *Respass* v. *McClanachan*, Hardin's Rep. 342. But certainly the language of Lord Bacon's rule, the decisions of Lord Hardwicke, Lord Eldon, Lord Manners, and others, are against these cases. See the subject discussed by *J. Story* in the case before mentioned of *Dexter* v. *Arnold*, 5 Mason. See also *Portsmouth* v. *Effingham*, 1 Vesey, Sen. 430, and the next note.

(2) *Blake* v. *Foster*, 2 B. & B. 462. Lord Chancellor—"In the answer the defendant has relied on her being a purchaser for valuable consideration, and on length of time, as her defence. Now, the object of the bill (a supplemental bill in nature of a bill of review) is to abandon the original defence, and to rely on the plaintiff's being barred by a deed of compromise. According to the opinion of Lord Eldon, in the case referred to, (*Young* v. *Keighly*,) this cannot be done. He says: 'As far as I can ascertain, what the court permits with regard to bills of review upon facts newly discovered, appears to have been on new evidence, which, if produced in time, would have supported the original cause; and are not applicable where the original cause does not admit the introduction of the evidence, as not being put in issue originally.'"

See, to the same point, *Young* v. *Henderson*, 4 Haywood, 189. *Huffaere* v. *Green*, Ibid. 52.

However, the express language of Lord Bacon's order, certainly admits new matter, as distinguished from new proof of old matters, to be the foundation of a bill. In the leading case of *Norris* v. *Le Neve*, 3 Atk. 33, Lord Hardwicke says: "There are two sorts of bills of review; one founded on supposed error appearing in the decree itself, the other on new matter which must arise after the decree, or upon new proof which could not have been used at the time when the decree passed."

The case of *Brewer* v. *Bowman*, 3 J. J. Marshall's Rep. 492, is pertinent and strong. The court there held, that bills of review for matters *de hors* the record could be sustained in two kinds of cases. For dis-

3 Leave of the court necessary.

By the English practice, if a bill of review be brought to reverse a decree upon new matter, in such case the plaintiff in the bill of review must have the leave of the court for filing it; but there is no need of leave, if the bill of review be brought to reverse a decree upon error appearing on the face thereof.(1) By the 173d Rule of our court, however, leave must be obtained, on a special application, in both cases.

4 Petition.

The course is to present a petition setting forth the nature of the suit, the decree, and the matters on which the application is founded, and praying for liberty to file the bill to bring such decree into review. It should be accompanied with all the proof, by affidavits, which the party can produce as to the facts, and the time of their discovery. The evidence, if it is freshly discovered evidence, should be distinctly set forth.(2) See Appendix, No. 208. By the 173d rule of our court, a deposit must be made, or security given, in the same amount which is required upon an appeal. As to this, see post, tit. Appeal, Chap. 25, § I.

The granting permission to file a bill rests entirely in the discretion of the court.(3) The case of *Wilson* v. *Webb*, cited

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covery of new matter not put in issue by the pleadings in the record sought to be reviewed, and which, had it been known and set forth, would have produced a different decree. *Second;* discovery of evidence of a permanent nature and unerring character, which, had it been produced, would have changed the decree.

The decision in *Partridge* v. *Usborn*, before cited, (5 Russell, 195,) is also in point. See the able argument of counsel at p. 222, and *Barnes* v. *Offer*, p. 225, n.

(1) *Gould* v. *Tancred*, 2 Atk. 533. *Moore* v. *Moore*, 2 Vesey, Sen. 598. *Anon.*, 2 P. Wms. 283. *Perry* v. *Phillips*, 17 Vesey, 171.

(2) Lube's Eq. Pl. 171. Cooper's Pleadings, 92. *Hollingsworth* v. *McDonald*, 2 Harr. & Johns. 230.

(3) *Sheffield* v. *Buckingham*, West's Rep. 682. *Wilson* v. *Webb*, 2 Cox's Ca. 3. This was an application for leave to file a bill of review to reverse a decree made on a creditor's bill, by which real estate was directed to be sold. An old deed had been discovered since the decree, by which it appeared that part of the property was held in tail, not in fee. The court held, that there was a clear intention by the father to satisfy creditors, by subjecting the real estate to their claims. Had he known of the entail, he probably would have suffered a recovery. It was not a case calling for particular favor. Without depriving the party of any legal advantage, the court could not be anxious to give him any assistance in defeating fair creditors.

in the note, is a striking instance of the exercise of this discretion in refusing the application against a legal right.

5 Time of filing the bill.

By the 173d rule a bill of review must be brought within the same time as is allowed for an appeal. See, as to this, post, chap. 24, § I. In England the limitation appears to be twenty years.(1)

It is not necessary to plead that the bill is not filed within the time limited. It ought to appear on the bill itself that it is so, or that the complainant is within the saving of the statute.(2) Indeed, under our rule the objection may be taken upon the presentation of the petition.

6 Proof of recent discovery

The fact of the recent discovery of the new evidence may be traversed by plea or answer.(3) Probably the court would adopt the practice of Maryland, and settle this preliminary question by affidavits, or an inquiry, upon hearing of the petition.(4)

7 Decree must be performed.

Permission will not be given to file the bill, unless the party has performed the decree.(5) It has been held, however, in North Carolina, that if the amount of a decree is placed in the hands of a master in bank notes, it is sufficient.(6) And, generally, that if security is given for the full performance of the decree, the bill may be filed; as also where the party is insolvent.(7) A similar rule appears to exist in Ireland.(8) Perhaps the provisions upon appeals would be applied to bills of this description.

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(1) *Lytton* v. *Lytton*, 4 Br. C. C. 441. *Edwards* v. *Carroll*, 2 B. P. C. 98.

(2) *Sheppard* v. *Lane*, 6 Munf. 529.

(3) *Dexter* v. *Arnold*, 5 Mason, 383.

(4) *Hodges* v. *Mullikin*, Bland's Rep. 506. The Chancellor said, on an application for leave to file a bill of review on the ground of newly discovered matter, "I consider it more correct that the propriety of granting the leave should be at once fully investigated; that proofs should be admitted in relation to it; and that the question should be then finally determined."

(5) See cases, ante vol. 1, p. 576, and note. Tit. Supplemental Bill in nature of a Bill of Review.

(6) *Taylor* v. *Persen*, 2 Hawks, 298.

(7) *Stallings Adm.* v. *Goodloe's Ex.*, 3 Murphy, 159.

(8) 1 Howard's Eq. Side, 329. *Swift* v. *Lightborne*. *Grace* v. *O'Hara*, cited *Ibid.*

If liberty to file the bill is granted, an order to that effect is entered.

See the form of a bill of review, Appendix, No. 209. The proceedings to obtain an appearance are the same as upon an original bill.

8 Defence to bill.

The appropriate defence to a bill of review varies according to the frame of that bill.

If the bill is for errors of law apparent on the decree, and the decree is fully and truly set forth in the bill, a mere demurrer is sufficient.(1)

But if the decree is set forth imperfectly, the defence should be by a plea in bar of the new suit, and a demurrer to opening the enrolment.(2) It was before noticed, that by our rule, even in the case of error of law, liberty to file the bill must first be obtained. Upon this application, I presume the validity of the alleged errors would be discussed. Still, if the court determined to admit the bill to be filed, it would, I suppose, only amount to a declaration that there was probable cause for allowing a review; and a demurrer and plea, or the former alone, would be still proper. It has been held, that a demurrer is proper where the bill is filed by a devisee.(3)

Where matter of defence exists out of the decree, such as length of time, a purchase for valuable consideration, fine and non-claim, or that the plaintiff's interest was assigned, a plea is the proper defence with a demurrer to opening the enrolment.(4) The plea in *Hartwell* v. *Townsend*, (note,) was,

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(1) The cases of *Whittington* v. *Attorney General*, Dickens, 616. *Glover* v. *Portington*, 1 Ch. Cas. 53. *Combs* v. *Proud*, Ibid. 54. *Slingsby* v. *Hale*, Ibid. 122. *Kenrick* v. *Brown*, 3 Br. P. C. 319, and *Jones* v *Pilcher*, 6 Mumford, 424, are cases of a demurrer alone. Lord Redesdale, (p. 166, 3d ed.) and Mr. Beames, (p. 306,) concur in this. It is adverted to also by the Chancellor in *Webb* v. *Pell*, 3 Paige, 368. I may observe, that the plea and demurrer in the last case was drawn by the present vice-chancellor of the first circuit when at the bar, and he had determined to demur alone, had the decree been fully set forth in the bill. But it omitted the very important recital.

(2) This is laid down as the usual mode of defence. *O'Brien* v. *O'Conner*, 2 Ball & Beatty, 146. *Webb* v. *Pell*, 3 Paige. *Gould* v. *Tancred*, 2 Atk. 534.

(3) *Slingsby* v. *Hale*, 1 Ch. Ca. 122.

(4) Lube, 326. Mitford, 291. *Hartwell* v. *Townsend*, 2 Br. P. C. 107. Blunt's ed. Ambler, 229, note. *Gorman* v. *McCulloch*, 5 Br. P. C. 597.

among other things, that the plaintiff had assigned or parted with his whole interest under the decree. Where the bill is upon new matter, any thing may be pleaded which would have avoided the effect of that matter, if charged in the original bill. The fact of the matter being discovered after decree is traversable by plea, though some doubt, Lord Redesdale says, has been entertained upon it; which doubt he himself removes.(1)

As, by our practice, the application would be upon notice, it can be very rare that the question as to the period of discovery will not be settled upon the hearing of the petition. If this is uncertain, either an inquiry would be directed, as before suggested, or the issue made upon the plea In *Gould* v. *Tancred*, Lord Hardwicke dismissed the petition, chiefly on the ground that it was disproved that the matters had come to the party's knowledge after the master's report. How the evidence was obtained does not appear.

It is well observed that a bill of review upon the discovery of new matter, and a supplemental bill of the same nature being exhibited only by leave of the court, the ground of the bill is generally well considered before it is brought; and therefore in point of substance it can rarely be liable to a demurrer. But if brought upon new matter, and the defendant should think the matter not relevant, probably he might take advantage of it by way of demurrer, although the relevancy ought to be considered at the time leave is given to bring the bill.(2)

For the form of a demurrer and plea, see Appendix, No. 210.

If the decree is pleaded, it is proper to enter an order of reference under the 48th rule. In *Webb* v. *Pell*, this was done pursuant to the then 19th rule. See the master's report in that case, Appendix, No. 211.

9 Effect of decision.

If the bill has assigned errors of law, and the plea and demurrer are allowed, an order to that effect is made, and that the bill be dismissed.(3) There is then an end of the suit, as

(1) On Pleading, p. 292. The doubt arose because the leave of the court had been given. I incline to think the application in England is upon notice. See Smith's Practice, vol. 2, p. 53, and *Wilson* v. *Webb*, 2 Cox's Ca. 3.

(2) Smith's Pract. vol. 1. 58, and see Lube's Pleadings, 328.

(3) *Webb* v. *Pell*, ut supra.

no fresh bill will be permitted after demurrer allowed.(1) If the demurrer or demurrer and plea are overruled, the usual decree is, that the original decree be reversed and the errors be allowed.(2) This may be the order in a very simple case; but in many instances there may be merely variations in the decree; and in others, consequential directions may be necessary. Lord Hardwicke states that if the demurrer is overruled, the plaintiffs are at liberty to read the bill and answer or any other evidence as at a rehearing the cause, being now equally open.(3) The case was one of a demurrer for errors on the face of a decree.

If the bill is brought for newly discovered matter, and a demurrer or plea and demurrer are overruled, it is laid down, that the defendant must answer, as fact is in issue.(4) The case will proceed upon such a bill as upon an original bill.

It seems that an affirmance of a decree by the court of errors will bar a bill of review for any error which existed on the face of the decree, though it was not examined into by the court.(5)

So a reversal of a decree, and directions what decree to enter, will bar a bill of review to inquire into errors on the face of the decree, but not noticed.(6)

It is a question, however, whether such a bill may not be brought after an appeal is decided, upon the ground of newly discovered matter.(7)

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(1) *Denny* v. *Filmore*, 1 Vernon, 135. *Pitt* v. *Arglass*, Ibid. 441. *Woots* v. *Tucker*, 2 Vernon, 120.

(2) *Cook* v. *Bamfield*, 3 Swanston, 607. Lord Nottingham adds, "And no further answer or hearing needs *per course de court*." This must however depend upon the nature of the cause. See *Catterall* v. *Purchase*, next note.

(3) *Catterall* v. *Purchase*, 1 Atk. 290. S. C. West's Rep. 447.

(4) *Cook* v. *Bamfield*, ut supra.

(5) Mitford, 88. *Lyon* v. *Merritt*, in Ch. 8th April, 1837. Post chap. 24, §1, sub. 10, *n*. *Brewer* v. *Bowman*, 3 J. J. Marshall's Rep. 492.

(6) Cases in the last note.

(7) *Barbon* v. *Searle*, 1 Vernon, 416. *Needler* v. *Kendall*, Rep. Temp. Finch, 468.

CHAPTER 24.

APPEALS.

SECTION I.

APPEALS TO THE COURT OF ERRORS.

1 Members.

THE court consists of the President of the Senate, the Senators, Chancellor, and Justices of the Supreme Court.(1) The whole number is 37. The Senators and Justices of the Supreme Court compose the court for the decision of appeals, the Senators and Chancellor for the determination of writs of error. Even under the present constitution the legislature has power to regulate the proceedings of the court.(2) This power has been exercised, and various provisions adopted, which will be noticed in their proper places.

2 Process.

Writs, and process of the court, shall be signed by the clerk, and tested in the name of the President of the Senate.(3)

3 Sessions.

Sessions of the court may be held at the capitol in Albany, at such times as the court shall, from time to time, direct, but not more than two such sessions shall be held during the recess of the legislature in any one year.(4) The court may hold the terms which shall be held in the interim of the sessions of the legislature, either in the city-hall at New-York, the capitol in Albany, or the academy in the city of Utica, as the court shall, from time to time, direct.(5) The governor has also power to change the place of meeting of the court, if he shall deem it requisite, by reason of war, pestilence, or public calamity, or

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(1) Constitution, Art. 5, 1.
(2) By the Chancellor, 2 Wendell, 218.
(3) 2 R. S. 165, § 9. (4) Ibid. 164. § 7. 5)) idbI. 8. §

the danger thereof. And a similar power is given to the court after a session has commenced.(1)

4 Regulation of practice.

By the 33d general rule of the court, in cases not already provided for, the practice of the court upon appeals shall be conformable to that of the House of Lords in England, when sitting as a court of appeals, until further order.

5 Who may appeal.

The right of appeal is, as a general rule, confined to the parties to the original cause. A person not a party to the record, though interested, will not usually be permitted to interplead by an appeal.(2)

This rule has, however, been relaxed in cases of a pressing nature.(3) A person who is party to the order, though not upon the record, may appeal; such as a purchaser under a decree, or a creditor coming in before the master to establish his claim.(4)

An appeal cannot be sustained by a mere volunteer for the benefit of another. It cannot be sustained by a person who cannot be injured by the alleged error of the judge, unless such person is the legal representative of a party who may be injured thereby.(5) No one can prosecute a suit in chancery, either

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(1) 2 R. S. 291, § 98, 102.

(2) Palmer on Appeals, 6. *Corporation of Ludlow, &c.* v. *Greenhouse*, 1 Bligh. N. Series, 73. Lord Powis, asserting that he was entitled to name the trustees of the charity in question in the cause, had made himself party to the appeal. It was declared by both Lord Redesdale and Lord Eldon, that the petition as to him ought to be dismissed, not being a party below.

(3) In *Root* v. *Stuyvesant*, Oct., 1838, the counsel of a mortgagee upon the property in controversy, and who was not a party, was heard upon the argument of an appeal. No objection, however, was made, and the case therefore is no decision. He presented a petition, setting forth his interests and submitted a written argument. *Oliver* v. *Conway*, May, 1817. Palmer's Pract. House of Lords, p. 6.

(4) *Rider* v. *Earl of Gower*, 6 Br. P. C. 148. *Earl of Winchelsea* v. *Garretty*, 1 Mylne & Keene, 253.

(5) *Reid* v. *Vanderheyden*, 5 Cowen, 720. The appellant had appealed from a decree of a surrogate establishing a will. There was a widow, and the appellant was a brother of the half blood, presumptive heir at law; but the wife was left *enceinte*. Before the appeal was brought the child was born. All the interest of the appellant was extinguished by this, whether the will was sustained or defeated. He could not have claimed even if the child had died, and the appeal was quashed by the court of errors. *Steele* v. *White*, 2 Paige, 480.

by appeal or otherwise, who is not interested in the subject matter; although there may have been an interest when the suit was commenced, if such interest is terminated during its progress, his right to interfere further in the litigation is at an end.(1)

It cannot be objected, on an appeal, by a party who has no interest in the question, and is not guardian of an infant, that such infant should have been a defendant, instead of a complainant.(2)

An appeal can be taken by a party only from such parts of the decree as affect him; he cannot question another portion which does not bear upon his rights or interests.(3) Any one of several parties against whom a decree is rendered may appeal from it.(4)

6 Extent of power on appeals.

The court has full power to correct and redress all errors that may happen in the court of chancery.(5) Upon any order or decree being brought into this court by appeal, the court shall examine all errors that shall be assigned or found in such order or decree, and shall hear and determine such appeal, and all matters concerning the same; and shall have power to reverse, affirm or alter such order or decree, and to make such other order or decree therein as justice shall require.(6)

7 What orders are appealable.

Much difficulty has arisen as to the orders from which an appeal will lie.

The very comprehensive language used in the old law has been omitted in the Revised Statutes. It was, "that all persons aggrieved by any sentence, judgment, decree or order, of the court of chancery, may appeal from the same, or any part thereof." There have been various decisions upon the extent of the right to appeal.

No appeal will lie from an order or decree entered by default.(7) The court will not, in such a case, entertain the appeal, although the same question may have been argued before the same court below in a different cause, and judgment pronounced, and written reasons delivered.(8)

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(1) *Idley* v. *Brown*, 11 Wendell, 238. (2) Ibid.
(3) Ibid. 227.
(4) *Johnson* v. *Johnson*, 1 Dana, 366.
(5) 2 R. S. 166, § 24.
(6) 2 R. S. 167, § 27.
(7) *Kane* v. *Whittick*, 8 Wendell, 219, and the cases there cited.
(8) *Henry* v. *Cuyler*, 17 Johns. 469.

And so entirely does the court of errors carry out the principle, that its authority is only to revise and correct a deliberate decision of the inferior courts, that it will not permit a point to be made which was not made in the court below.(1)

It has been doubted whether an appeal would lie from an order dissolving an injunction. There are, however, instances of such an appeal.(2)

An appeal from an order refusing to dissolve an injunction has been expressly sustained.(3) And the supreme court was of opinion, that an appeal would lie from a decision refusing to grant an injunction.(4)

The judges who delivered opinions in *Beach* v. *The Fulton Bank*, expressed their sense of the difficulty of stating any definite rule upon the subject as to what orders were appealable. Marcy, J., said, that the test was not whether the order was one which was granted or refused in the exercise of the discretion of the court, because the court of errors, in repeated instances, has refused to restrict itself by this consideration, and in several cases has sustained appeals on orders emanating from the discretionary power of the court. He appears to consider, that no general rule had been, or ought to be declared; each case should depend upon its own characteristics, that the right was highly prized and valuable, and an unnecessary restriction upon its exercise would interfere with the administration of justice.

Sutherland, J., agreed substantially in this view. He stated, that whenever a motion is made to dismiss an appeal, the question should be, is the order such as materially affects the merits of the cause. If so, the appeal should be sustained, and the inquiry should be not into the merits of the cause, but on the abstract question, whether the order will probably affect the

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(1) Ibid. See also *Campbell* v. *Stokes*, 2 Wendell, 137. See post, subdivision, 39.

(2) *Young* v. *Grundy*, 6 Cranch, 51. See this subject, fully examined by Marcy, Justice, in *Beach* v. *The Fulton Bank*, 2 Wendell, 230. The important case of *Simson* v. *Hart*, 14 Johns. 65, came up on an appeal from an order dissolving an injunction. So, the case of *Martin* v. *Dwelly*, 6 Wendell, 11. There was such an appeal in *Wood* v. *Dwight*, 7 Johns. C. R. 295, though I do not find that it was prosecuted.

(3) *McVickar* v. *Wolcott*, 4 Johns. Rep. 510.

(4) *Hoyt* v. *Gelston*, 13 Johns. Rep. 140.

merits. The chancellor used yet more comprehensive language. "The true question he conceived to be, is the order such as that the party may be aggrieved by it. He could hardly imagine any order of the court which did not affect the merits of the case, either directly or indirectly. Initiatory orders might be an exception. Where a party is aggrieved, or may be aggrieved by an order, he has a right to appeal."

In the subsequent case of *Chapman* v. *Hamersley*, 4 Wendell, 173, it was held, that an appeal would not lie from an order directing a sale of the property in litigation, and that the money be brought into court. J. Marcy said the order could not affect the merits, and related only to the preservation of the property. It had been asked for in the appellant's bill, to be made after the accounts were taken. The appeal was dismissed.

In *Williamson* v. *Hyer*, 4 Wendell, 170, an appeal was dismissed from an order refusing to rehear a motion for instructions to a master as to the examination of a witness. J. Marcy doubted if an appeal could lie from any order refusing a rehearing. The circumstances must be very strong. He also questioned whether the order refusing those instructions could be appealed from. The matter could come up on exceptions.

In *Rogers* v. *Paterson*, 4 Paige, 450, a cause had been remitted from the court of errors decreeing a transfer of securities and payment of money by a complainant to the defendant. The decree was entered. The complainant died. The suit was revived at the instance of the defendant against his executors. And the chancellor held that an appeal would lie from the order of revival.

The provisions of the Revised Statutes as to when an appeal shall be a stay of proceedings, do not, it is supposed, prevent the recurrence of the question as to what orders are appealable. The first series of sections [80 to 86 inclusive] relate to the bond or deposit requisite to make an appeal at all effectual, and to the conditions on which, (as to certain orders or decrees directing certain specified acts), an appeal shall stay proceedings upon such orders or decrees, and the subject matter embraced in them. These provisions of course show that all such orders are appealable.

Then the 87th provides that where the cause is for certain purposes, as the payment of money, &c., and an appeal is taken from any interlocutory order made in such cause, the court of

chancery may require such things to be done by the appellant as are required to be done by him, in similar cases, upon an appeal from a final decree.

By this I understand interlocutory orders not directing the specific thing to be done, (for such an order is provided for in the preceding sections), but any other order in the cause.

Yet this provision seems intended to check appeals for the sake of delay, and to increase the security of the party obtaining the order, and not to pronounce that if such provisions are complied with any interlocutory order is appealable.

The 89th section is indeed comprehensive—that in all cases not provided for in the statute, the filing and perfecting an appeal, by giving bond for the payment of costs, shall stay all proceedings in the court of chancery upon the order and decree, and the subject matter thereof except in the three cases specified. Still even this clause appears to do no more than to perfect the system as to the effect of an appeal as to staying proceedings. The question as to the nature of the order seems untouched, and to be left to the appropriate tribunal, the court of errors.(1)

An appeal does not lie from an order for payment of costs where the giving such costs is discretionary, except it be for the general costs of the cause. In the latter case, the appeal must be made in fifteen days after notice given to the party or his solicitor of such decree.(2)

But where a party appeals upon a substantial ground, the appellate court may vary the decree as to costs although the appellant fails.(3)

And where costs are given contrary to statute, or are refused to a party who is entitled to them as matter of strict right, an appeal will lie.(4)

8 Time for appealing from final decrees.

Appeals from final decrees must be made within the same time after the enrolment of such decree, as is prescribed for bringing writs of error upon judgments at law subject to the same exceptions and provisions in favor of persons under dis-

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(1) *Wood* v. *Dwight*, 7 Johns. C. R. 295.

(2) *Winslow* v. *Collins*, 3 Paige, 88. *Fulton Bank* v. *New-York and Sharon Canal Company*, 4 Paige, 126. See also *Coneter* v. *Ewing*, 1 Molloy, 19, and *Rogers* v. *Holly*, 18 Wendell, 350.

(3) *Winslow* v. *Collins*, ut supra.

(4) *Buloid* v. *Miller*, 4 Paige, 473.

ability at the time of rendering such decree, and subject to the same restrictions, except where provision is otherwise specially made by law.(1)

That period is fixed by the statute at two years.(2) The exceptions are—where the person against whom the judgment is made is within the age of twenty-one years, or insane, or imprisoned on any criminal charge, or in execution upon some conviction of a criminal offence for any term less than for life, or is a married woman.(3)

The time during which such disability continues shall not be deemed any portion of the time limited for bringing the appeal, but such person may bring it, within two years after the disability is removed.(4)

If the party entitled to appeal should die during the continuance of any such disability, his heirs, devisees, executors, or administrators entitled to prosecute the appeal, may appeal at any time within two years after such death.(5)

The existence of any disability shall not authorize an appeal after the expiration of five years from the enrolment of the decree.(6)

These provisions have been chiefly adopted from an order of the House of Lords, of the 24th of March, 1725.(7) That order limits the time for appealing to five years from the signing and enrolling the decree. It has, however, been decided that where a decree had been pronounced more than twenty years, but was enrolled within five years before the appeal, the appeal would not lie.(8)

9 Time for appeal from interlocutory orders.

The time for appealing from interlocutory orders or decrees, including decrees for the general costs of the cause, is fifteen days after notice of such order or decree shall have been given to the party or his solicitor.(9)

There is a variation in the language of this section from that used in the section respecting appeals from a vice-chancellor. (2 R. S. 179, § 59.) In the latter it is *after notice of the*

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(1) 2 R. S. 605, § 78.
(2) 2 R. S. 594, § 21.
(3) Ibid. § 22.
(4) 2 R. S. 595, § 22.
(5) Ibid. § 23.
(6) Ibid. § 24.
(7) Palmer's Pr. House of Lords.
(8) *Smythe* v. *Clay*, 6 Br. P. C. 395. Also *Edwards* v. *Carrol*, cited p. 405.
(9) 2 R. S. 605, § 79.

order—the words "shall have been given to the party," being omitted.

It is settled by several decisions upon appeals from a vice-chancellor, that the order takes effect after notice of its being entered; not from the time of its being pronounced, although the solicitor or party should be present. And that if the appellant enters the order he has notice from the entry. The adverse party need not give him a formal notice.(1)

These decisions are even more applicable to appeals from the chancellor, than to those from a vice-chancellor, from the use of the phrase "shall be given to the party." Indeed even as to the party entering the order, it would be open to question whether in order to limit his right the notice should not be given by the adverse party. At least it would be prudent to do so.

In *Jenkins* v. *Wild*, 14 Wendell, 544, a decree had been entered on the 12th September, 1834, and the appeal filed the 25th October, 1834. The question was if the appellants had notice of it more than fifteen days previously.

No written notice had been given to the appellants. It was held that notice in the section as to appeals to the court of errors does not mean knowledge, but a regular formal notice to be given. "This notice must be given, and implies a positive act of the party in whose favor the decree is made, to limit the right to appeal. Possibly the party entering the order or decree would be estopped as in 4 Paige, 273, from alleging that he had no notice of his own acts. The statute does not require notice to be given to the prevailing party." The motion to dismiss the appeal was denied.

Where then a party enters an order himself, and there is no doubt of his being the *prevailing* party, he would be probably bound. But there are many cases of a complexity of success, where it may be advisable for the party entering the order, and generally successful, to appeal. I think it most safe for the opposite side to serve a notice even in this case, if he would insure the limitation of the time to appeal.

10 Distinction between final decrees and interlocutory orders.

This is a matter of much importance, as the time for appealing from an interlocutory decree is but fifteen days.

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(1) *Eldridge* v. *Howell*, 4 Paige, 458. *North American Coal Company* v. *Dyett*, 4 Paige, 275.

It perhaps may be stated as the rule in our court that no decree is final upon this question of appeal, but such as settles all points in controversy, and terminates the litigation.

In *Waters* v. *Travis*, 1 Johns. C. R. 88, the bill was for a specific performance for the sale of land, and an account. The plaintiff had taken possession and made payments. The defendant had recovered in ejectment. In 1808, the court decreed a conveyance, and directed an account of the payments, &c., the quantity of land to be conveyed, and reserved the question of costs. This decree was appealed from, and affirmed, (9 Johns. Rep. 450). In 1813 the master reported a small balance due, and by a decree of 31st May, 1813, a conveyance was decreed upon that amount being tendered. The decree was silent as to costs, but in October following, they also were decreed. There was a rehearing ordered as to this decree for costs. The chancellor held it clear that the decree of May, 1813, was the final decree in the cause, made upon the report ascertaining the land to be conveyed, and the balance to be paid. It was the final end and closing of the controversy. The decree of 1808 could not be so regarded, for though the right to a specific performance was declared generally, yet the extent of that right, and the conditions upon which it was to depend were not ascertained; and decided it could not be reheard for costs. This was affirmed by court of errors, 12 Johns. Rep. 500. See Justice Platt's opinion, p. 508.

The case of *Jaques* v. *the Methodist Church*, 17 Johns. Rep. 549, (3 Johns. Ch. Rep. 77, 120,) is important upon this head. The first decretal order in June, 1815, declared certain principles, and directed an account to be taken upon them: that a certain settlement was valid, that the defendant should account for all the personal estate of his wife come to his hands; for the rents and profits of real estate, that he should have no allowance for maintenance of his family, and that certain real estate should be sold, and the proceeds distributed according to the will of Mrs. Jaques, and other directions. The cause again came before the court upon exceptions to the report. Some were allowed; others disallowed. Upon the consideration of these exceptions, the chancellor determined that a feme covert was to be considered a feme sole as to her separate estate, only to the extent of the power given by her marriage settlement. The report was re-committed and amended pursuant to the

directions. On the 15th June, 1818, the cause came on for hearing on the reports and equity reserved, when a final decree was made directing the payment of certain sums, and of costs. From this decree an appeal was made. A preliminary objection was taken that it was meant to bring in review all the interlocutory orders and decrees in the progress of the cause, made fifteen days before this appeal was filed. On the other side it was argued that a decree which determined the merits or principles of a cause was a final decree. So there might in a cause be several final decrees. It was held, [Spencer, Ch. J.] that the final decree was that of the 15th June, 1818: after the decree of 1815, facts were to be ascertained; and this was necessary before a final decree could be made.

This case is very illustrative of the doctrine of the court as to the effect of an appeal from a final decree, upon previous orders or decrees. The decree of June, 1815, determined that the deed of September, 1805, was a valid settlement, and secured the property to the separate use of Mary Jaques. A point was made in the court of errors that it was invalid, and was examined and passed upon in that court. The case in form came before that court upon the appeal from the decree upon exceptions to the report, depending upon the question of a married woman's power over her separate estate. Still it is obvious that this question involved that of the settlement, for if that was void, there was no separate estate to give rise to the controversy.

Again, the decree of 1815 refused any allowance to the defendant for family expenses out of capital of his wife's property, on the foot of any general agreement. (3 Johns. C. R. 85, 86.) This was reversed by the court of errors; the agreement established, and the husband allowed his advances.

A careful examination of this case will show, that every point of law arising upon the decree appealed from, viz. that of June, 1818, arose upon the decree of 1815, was then settled; and could have been determined by the court of errors upon an appeal. I refer to the very careful and able opinion of O'Neall, J., in the case of *Price* v. *Nesbit*, 1 Hill's Ch. Rep. 454, for a full view of this case.

In *Price* v. *Nesbit*, a decree had been made by Chancellor James, declaring a party responsible for certain negroes and their hire, and as the defendant had sold all the negroes but one,

"that he deliver up that one, pay for the others according to their value at the time of purchase, and for their hire, and that it be referred to the commissioner to ascertain the value of the negroes and their hire." This decree was made in 1822, and was affirmed by the court of appeals.

Upon the reference it appeared that the plaintiff had received his full share of the estate including the price of the negroes sold. He submitted the point, if the plaintiff could again receive the value; but reported the amount of hire and value. Chancellor Dessaussure decreed, that the plaintiff must account for what he had received of the estate, and sent the report back. Upon a report of the commissioner asking directions as to taking such account, Chancellor Harper confirmed the report of value under Chancellor James' decree without referring it back to carry into execution the decree of Chancellor Dessaussure. From this the appeal was brought. It was decided that the decree of the court of appeals was not a final decree, and therefore, that that decree was examinable by the court below upon the appeal before it, and that court held that the original decree of Chancellor James was manifestly erroneous, and set it aside. See also *Harrison* v. *Jenkins*, cited in the principal case.

The extent to which this case went as to the power of the court below, may be open to serious objection ;(1) but it is very strong as to the nature of a final decree and the power of the appellate court.

See also *Reid* v. *Vanderheyden*, 5 Cowen, 719.

In *Kane* v. *Whittick*, 8 Wendell, 224, J. Sutherland said, "A decree does not become final, because it settles one or more of the material questions involved in the case, if any other material fact or question remains undisposed of."

In that case a decree was made in 1828, declaring that a deed absolute in terms was intended to be a mortgage, and was adjudged to be such, and ordering a reference to a master to

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(1) *Lyon* v. *Merritt*. In chancery 18th April, 1837. The Chancellor —This court has no power to rehear and modify an order or decree which has been affirmed upon appeal to the court for correction of errors upon the point as to which the rehearing or modification is sought, unless the right to alter or modify was reserved in the original decree or order, or in the decree of affirmance. See *McNeil* v. *Cahill*, 2 Bligh, N. S. 316.

state an account consequent upon such decision. The master made his report, finding a certain sum due from the defendant. This was confirmed; and a decree of payment and for execution made in 1829, upon the default of the defendant. From this an appeal was filed, as well as from the decree of 1828.

It was held that, the decree of 1828 was interlocutory; though it decided the main point in controversy between the parties, yet it left the amount for which the deed was given unascertained. And a final decree could not be made until the coming in of the report. That decree not being appealed from in fifteen days, could not now be considered, unless opened by the appeal from the decree of 1829. This last was by default, and no appeal lies from a decree by default or consent; as therefore the appeal could not be sustained from either decree separately, it could not be supported by making the appeal from the two in connection.

In the case of *Harvey* v. *Branson*, 1 Leigh, 108, the court had passed upon and settled all the rights of the parties, declaring their proportions of the property in question, and appointing commissioners to sell the same, and distribute the proceeds, with liberty to apply to change the commissioners or for a partition of the subject, instead of a sale. This was held a final decree. Brooke, President, said—"All the reservations were simply provisions for the *execution of* the decree, as one final and conclusive, not reservations of any points for future consideration and decision." Of the same character is the case of *Ray* v. *Law*, 3 Cranch, 179, in which it was held that a decree for the sale of mortgaged premises was final; which beyond a doubt it is in our state.

In *Thornton* v. *Fitzugh*, 2 Leigh, 209, Carr says, the cases take this distinction, that where any thing is reserved by the court for future adjudication, in order to settle the matters in controversy, the decree is interlocutory; but where upon the hearing all these matters are settled by the decree, such decree is final, though much may remain to be done before it can be completely carried into execution, and though to effectuate such executions, the cause is retained, and leave given to apply for aid.

See also *Price* v *Nesbit*, *ante* p. 22.

In the case of *Jenkins* v. *Wild*, 14 Wendell, 539, Ch. Justice Savage concluded that there was a test of the question whether a decree is final or interlocutory, arising from the

language of the present statute. He notices that appeals from final decrees are now to be made within the same time *after the enrolment of such decree*, as prescribed for bringing writs of error. The language of the act of 1813, was—*within five years after the making the decree.* "That the term enrolment is applicable to a final decree only. It seems to follow that none are final unless capable of enrolment. All others are interlocutory, though they decide the principle in controversy. That a decree which refers any matter to a master, where facts must be ascertained, and a report must be made before the rights of the parties are completely and finally settled, was particularly an interlocutory decree."

I understand the chief justice to say that the question is not whether a decree has been enrolled, but whether it could be enrolled.

There were in that case first a bill for partition, next a bill of foreclosure by a defendant in the first bill upon a mortgage given by the complainant on his fourth part, and another bill of foreclosure by the same defendant against a co-defendant. Another bill of partition was filed by a defendant in the first suit of other lands. The bills of foreclosure were taken as confessed, and the amounts reported. A bill of review was filed stating errors in the accounts, for securing the balance of which the mortgages were given. A report was made of a large sum due to the mortgagee besides his mortgage money. Then a decree was made that the property comprised in the first partition suit be sold, and after certain payments of liens, &c., the proceeds be brought into court; that partition be made of the property in the other suit, specifying the rights of the parties, subject to the mortgages; that the premises be sold at the same time, under the several decrees of foreclosure and partition: the defendant mortgagee be paid half the proceeds, his mortgages out of the other half, and the residue brought into court. That the master restate the accounts, and on confirmation of the report either party might apply. The bill of review was dismissed with costs. An appeal was entered from this decree, which was made in all the suits.

The chief justice held that the decree dismissing the bill of review could have been enrolled, and was final; and in all other points the decree was interlocutory.

It is reported to have been said by Lord Hardwicke, that a

decree for an account was never enrolled.(1) The contrary is however clearly established.(2)

Upon a bill of interpleader a decree that the bill is properly filed is a final decree within the statute. It is the only decree which the complainant is interested in obtaining.(3)

11 Appeal. How made.

The party appealing must within the time prescribed, deliver to the register, assistant register or clerk with whom the decree or order is entered, a written notice stating that such decree or order, or some particular part thereof, to be specified in such notice, is appealed from.(4) See Appendix, No. 212.

Within eight days thereafter he must serve a like notice on the solicitor of the adverse party, or the appeal shall be considered as waived.(5) There is no provision in the statute as to service of such a notice upon the solicitor, but it is a regulation of the court of chancery.(6)

12 Bond.

Within the time allowed for the appeal, the appellant must also make the deposit, or file the bond required to be given as security for costs.(7)

By the 80th section of the act, an appeal shall not be effectual, for any purpose until a bond in a penalty of at least two hundred and fifty dollars, with sureties to be approved by such officer of the court of chancery as the chancellor shall designate for that purpose, be given to the adverse party, conditioned for the diligent prosecution of such appeal, and for the payment of all costs and damages that may be awarded against the appellant thereon; or until the appellant shall have deposited the sum of two hundred and fifty dollars, with the register or assistant register, to be applied, under the direction of the court, for the payment of all costs and damages that may be awarded against the appellant on such appeal.

See the form of the bond, Appendix, No. 213.

The bond may be approved of by any vice-chancellor or in-

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(1) *Stanton* v. *Oldham*, 2 Atk. 385.

(2) *Parker* v. *Downing*, 1 Mylne & Keene, 635, and cases. 1 Eagle & Young, 755.

(3) *Atkinson* v. *Manks*, 1 Cowen, 691. Such was the rule laid down by J. Sutherland. He does not however place his opinion upon it entirely, considering that the first decree made to this point, was examinable under the appeal from the final decree.

(4) Rule 117.

(5) Ibid.

(6) *Eldrige* v. *Howell*, 4 Paige, 458.

(7) Rule 117.

junction master, or by the register, assistant register or clerk, with whom the appeal is entered. His approbation must be endorsed upon it.(1)

The assistant register or clerk is not authorized to approve of a bond on an appeal entered with the register. It must be approved by a vice-chancellor, injunction master, or the officer in whose office the appeal is to be entered. This approval by a proper officer designated by the court, being a statutory provision, is a formality which the court cannot dispense with in appeals to the court of errors.(2) But as to appeals from a vice-chancellor, it is a provision by rule of court merely, and is an irregularity which may be corrected, or may be waived by the adverse party.(3).

It must be executed by at least two responsible sureties, who are residents of the state and householders.(4)

If the officer is not personally acquainted with the sureties offered and satisfied of their responsibility, he should require them to justify in at least double the amount of the penalty of the bond, as required by law. He should examine them as to the nature of their property and place of residence. And in cities should require a specification of the number of the house occupied by them, and the street in which it is situated.(5)

For the form of such affidavit, see Appendix, No. 214.

The affidavit should be annexed by the officer to the bond, and filed with it.(6)

The appellant need not join in the bond.(7)

The solicitor for the appellants may be a surety in the bond.(8)

The officer should approve of the sufficiency of the sureties as well as of the form and execution of the bond. He should also state in his certificate of approval, that each of the sureties is worth double the amount of the penalty of the bond over and above all debts and responsibilities.(9)

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(1) Rule 116. (2) *Rogers* v. *Patterson*, 4 Paige, 453.
(3) *Hawley* v. *Bennet*, 5 Paige, 104.
(4) *Van Wezel* v. *Van Wezel*, 3 Paige, 38.
(5) Ibid. (6) Ibid.
(7) *North American Coal Co.* v. *Dyett*, 4 Paige, 274.
(8) *Studwell* v. *Palmer*, 5 Paige, 57.
(9) *Eldrige* v. *Howell*, 4 Paige, 459.

See the form of such certificate, Appendix, No. 215.

A master who has acted as solicitor or counsel in the cause or matter in which the appeal is taken, or whose law partner has thus acted, cannot regularly approve of the bond. But here also liberty will be given on appeal from a vice-chancellor to amend, by filing a new bond *nunc pro tunc*, or by procuring the same bond to be approved of by the proper officer.(1)

But it is presumed that no such relief can be given in this court upon appeals to the court of errors.(2)

There is a general provision in the Revised Statutes of importance upon this subject. It is enacted(3) that whenever a bond is or shall be required by law to be given by any person, in order to entitle him to any right or privilege conferred by law, or to commence any proceeding, it shall not be necessary for such bond to conform in all respects to the form thereof prescribed by any statute; but the same shall be sufficient if it conform thereto substantially, and do not vary in any matter to the prejudice of the rights of the party to whom or for whose benefit such bond shall have been given.

If the bond is defective in any respect, the court, officer, or body who would be authorized to receive the same, or to entertain any proceedings, in consequence of such bond, if the same had been perfect, may, on the application of all the obligors therein, amend the same in any respect; and such bond shall thereupon be deemed valid from the time of the execution thereof.(4)

Perhaps the court of errors could remedy the defective execution of a bond under this provision.

13
Deposite, &c.

The appellant instead of a bond may deposite the sum of two hundred and fifty dollars with the register or assistant register to be applied under the direction of the court, for the payment of all costs and damages that may be awarded against the appellant on such appeal.(5)

But the deposit shall not be required in cases where a bond for the payment of costs on such appeal, shall have been given.(6)

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(1) *McLaren* v. *Charrier*, 5 Paige, 533.
(2) *Rogers* v. *Patterson*, 4 Paige, 453.
(3) 2 R. S. 556, § 33, 34.
(4) 2 R. S. 556, § 34.
(5) 2 R. S. 605, § 80.
(6) Ibid. § 81.

By the Revised Statutes, in particular cases, something more must be done to render an appeal a stay of proceedings besides the bond or deposite to meet the costs.

14

Stay of proceedings.

By the 82d section, if the appeal be from an order or decree directing the payment of money, such appeal shall not stay the issuing of execution or other process to enforce the decree, or any proceedings thereon, unless a bond be given by, or on behalf of the appellant, to the adverse party, in a penalty at least double the sum decreed to be paid, with two sufficient sureties (approved as directed in the 80th section) conditioned that if the appellant shall fail to prosecute his appeal, or if the same be dismissed or discontinued, or if the decree appealed from, or any part thereof, be affirmed; then such appellant will pay and satisfy the amount directed to be paid by such decree, or the part of such amount as to which such decree shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant by the court for the correction of errors, upon such appeal.

Money decreed.

For the form of such a bond, see Appendix, No. 216.

If the decree below directs the assignment or delivery of any securities, evidences of debt, documents, chattels or things in action, the issuing and execution of process to enforce such decree, shall not be stayed by such appeal, unless the articles required to be assigned or delivered, be brought into court, or placed in the custody of such officers or receivers as the court shall appoint: as a substitute for such delivery a bond may be executed in a penalty at least double the value of the articles so directed to be delivered or assigned, to the adverse party, with two sufficient sureties, conditioned that the appellant will abide and obey the order of the court for the correction of errors made upon the subject of such appeal.(1)

Assignment of securities, &c.

The approval of the bond must be by the officer appointed by the chancellor under the 80th section.—By the 116th rule such officer is any vice-chancellor, injunction master, or the register, assistant register or clerk with whom the appeal is entered.

Attention should be given to the decisions before adverted to, as to the right of the register to approve the bond when the appeal is entered with the assistant register, and *e converso.*

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(1) 2 R. S. 606, § 83.

Decree for execution of conveyance.

If the decree appealed from, direct the execution of any conveyance or other instrument by any party, the issuing and execution of process to enforce such decree, shall not be stayed by such appeal until the appellant shall have executed the conveyance or instrument directed, and deposited the same with the register or assistant register of the court to abide the final order and decree of the court for the correction of errors.(1)

Decree for sale or delivery of real estate.

Again if the decree or order direct the sale or delivery of the possession of any real estate, the issuing and execution of process to enforce the same shall not be stayed, until a bond be given with sureties, (as therein before directed)(2) in such penalty as the court of chancery shall deem sufficient, conditioned that during the possession of such real property by such appellant, he will not commit or suffer any waste to be committed thereon, and that in case such appeal be discontinued or dismissed, or such order or decree be affirmed, such appellant shall pay the value of the use and occupation of such property from the time of such appeal, until the delivery of the possession thereof pursuant to such decree or order.(3)

It may be observed that the 82d, 83d, 84th, and 85th sections differ from the 80th section in this, that the bond must be given under the latter section in order to render the appeal effectual for any purpose, while under the others, the filing the bond makes the appeal valid in every particular, except that process may be resorted to for enforcing the decree, unless the other requisitions of the sections are complied with.

But by the 86th section whenever in the foregoing cases, an appeal shall be perfected by bringing into court, or depositing pursuant to its order any articles required to be so deposited, or any instrument required to be executed, or by the giving of a bond as prescribed, such appeal shall stay all further proceedings in the court of chancery, upon the order or decree appealed from, and upon the subject matter embraced in such order or decree.

The court however may proceed upon any other matter included in the bill, and not affected by such order or decree.

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(1) 2 R. S. 606, § 84.

(2) That is to be approved of by the officer appointed under the 80th section and to be given to the adverse party. See ante, p. 26.

(3) 2 R. S. 606, § 85.

In all other cases not provided for by the provisions of the statute, the filing and perfecting an appeal, by giving bond for the payment of costs thereon, shall stay all proceedings in the court of chancery upon the order or decree appealed from, and upon the subject matter thereof, except in the cases therein mentioned.(1)

These are 1st. Where the order appealed from directs the sale of perishable property. A special order may be obtained for the sale after the appeal, and that the proceeds be brought into court to abide the decision of the court of errors.

2d. Where the order appealed from is interlocutory—either party may proceed at his own expense, under the direction of the court, upon proper cause shown to take testimony in the cause conditionally, to be used thereafter in the cause in the same cases in which testimony taken conditionally in an action at law may be used.(2)

3d. When the order appealed from is for the commitment of any person for a contempt, or for the purpose of enforcing the rights or remedies of any party—proceedings on such order shall be had, notwithstanding such appeal, or the same shall be stayed, as the court may direct, on such terms as it shall think proper to impose.

By these clauses, the revisors consider that they have provided for every case in which the right of appeal should be checked and restrained by conditions, requisite for the protection of the successful party.(3) There are some cases however which merit consideration, as to whether they are omissions, and if so whether judiciously omitted.

The rule in our court before the Revised Statutes is thus stated by Chancellor Kent: That an appeal does stay all proceedings on the point appealed from, and if the party wishes to proceed, he must obtain an order of the court for that purpose.

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(1) 2 R. S. 607, § 89.

(2) The taking of testimony conditionally is provided for in the act, 2 R. S. 391. The testimony must be material and the witness must be about to depart from the state, or where he is so sick or infirm as to afford reasonable grounds for apprehension that he will not be able *to attend the trial.* This is the phrase of the act. It would of course be varied upon an application to this court.

(3) Notes vol. 3, p. 794.

On the contrary, by the English rule, an application must be made to stay the proceedings upon a decree.(1)

One rule of the English court upon this subject is, that where a reference is directed to state accounts, the appeal shall not stay it. This rule is rarely deviated from.(2)

Suppose a case of a decree directing accounts with a provision for delivering the possession of real estate, an appeal, and that bonds have been given pursuant to the 80th and 85th sections; does the appeal necessarily stay the reference?

The language of the 89th section appears to decide this affirmatively. Except in the cases enumerated, the appeal being perfected by the bond for costs is to stay all proceedings upon the "order or decree appealed from, and upon the subject matter thereof." The bond under the 85th section stays process to compel the delivery of possession, and that under the 80th section stays the proceedings upon the reference.

But suppose an appeal was taken only from the direction to deliver possession of the real estate; the question would be whether the accounts could be taken. If the latter clause of the 86th section was, that the appeal shall not prevent the court from proceeding upon any other matter included in the bill, and not affected by such order or decree, *or by so much thereof as is appealed from*, no question could exist.

15 Petition of appeal.

A petition of appeal must be filed in the office of the register or assistant register with whom the decree or order appealed from is entered, within eight days after entering the appeal in the court of chancery, or such appeal shall be considered as waived, and that court may proceed, notwithstanding the appeal.(3)

The petition whether filed in the recess or during the sitting of the court, shall pray that the decree or order appealed from may be sent to the court of errors and filed without delay.(4)

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(1) *Green* v. *Winter*, 1 Johns. C. Rep. 81. *Huguenin* v. *Bazeley*, 15 Vesey, 184. *Lewes* v. *Morgan*, 5 Price, 280. *Hart* v. *Mayor of Albany*, 3 Paige. See *Edwards* v. *Morgan*, 1 McClelland & Young, 258.

(2) *Nerot* v. *Burnand*, 2 Russell, 56.

(3) Rule 7 of court of errors. This rule dispenses with the old practice of applying for an order to compel the party to file his petition of appeal. I presume the court of errors could relax this rule in a proper case. Certainly the court of chancery could not.

(4) Ibid.

In every such petition it shall be sufficient to set forth the decree, decretal or other order appealed from, without reciting the pleadings in the cause; and stating that the decree, decretal or other order so appealed from, or some part thereof, (specifying what part or parts) is erroneous, and that the same ought to be reversed or modified, as the case may be.(1) It should be signed by one counsel.

For the form of the petition, see Appendix, No. 217.

16 What is to be sent to the court, and when.

The officer of the court of chancery with whom such petition shall be filed, shall make and annex to the petition of appeal the decree, decretal or other order appealed from, and such other order as may be required to be returned to the court of errors, without any of the pleadings, proofs, or exhibits in the cause.(2)

But if the cause has been brought to a hearing, and heard prior to the decree or order appealed from, then the officer is also to annex a copy of the minutes taken by the Register or Assistant Register respecting what was read or used in the court below, or offered and overruled on objection, or admitted at the hearing.(3)

The solicitor should be careful that the minutes thus to be returned are complete, and contain every thing important for him to use in the court of errors.

Authenticated copies of the pleadings, proofs, and exhibits, or such of them as may be relied on by either party, shall be produced at the hearing by the parties.(4)

The party appealing shall, in every case, cause the petition of appeal, with the matter to be annexed to the same, to be brought into the court of errors, and filed with the clerk thereof, by *the day mentioned in such petition*, or when duly prepared by the officer as before directed; or in default thereof shall lose the benefit of such appeal, unless the court shall see cause to allow a further day for that purpose.(5)

The phrase *by the day mentioned in such petition*, is not now very precise, as the petition, by the present rule is, that the decree may be sent to the court "without delay." By the former rule(6) the petition was, that the decree be sent to the

(1) Rule 8 of court of errors.
(2) Rule 9.
(3) Rule 9 of court of errors.
(4) Ibid.
(5) Rule 10.
(6) Rule 7. 9 Cowen, 288.

court on the first day of the next session thereof, or if filed during the sitting of the court, be sent without delay.

In *Irving* v. *Dunscomb*, 2 Wendell, 207, the chancellor says, "Here the petition of appeal is in the first instance to be filed in the court of chancery. If the court of errors is in session, it is returned here immediately with the transcript of the decree, and of the minutes of the hearing annexed thereto. But if filed in the recess, it is to be returned here on the first day of the next session. In the first case, the court is possessed of the cause by relation from the time when the petition was returnable during the session. And I apprehend it would be regular under the 26th rule, to enter an order to answer during the recess of the court. In the latter case, however, this court are not possessed of the cause until the first day of the next session. But in neither case can an order to answer be regular, until the petition of appeal with the transcripts annexed, is actually returned and filed in this court."

17 Order to answer.

On the petition of appeal being filed, the appellant may have an order of course, for the respondent to answer the petition in eight days after service of a copy thereof, or be precluded.(1) If the respondent shall not comply with the said order, he shall be precluded from answering the petition, and the appellant may proceed to take such decree as the case may require.(2) The order to answer cannot be entered until the petition with the transcript annexed, is actually returned and filed in the court of errors.(3)

It may be entered at any time by the clerk of course, in the minutes of the court, upon the written request of the solicitor at the peril of the party entering the same, with the like force and effect as if entered by direction of the court during its session.(4) For the form of this order, see Appendix, No. 218. A copy of the rule to answer, must be served upon the solicitor of the respondent. If none is employed, the service must be on the respondent personally.(5) It is not sufficient that the respondent's solicitor has been served with the petition of appeal; the order to answer must be served.(6) Although it is stated by the learned counsel in *Waters* v. *Travis*, that it was not the

(1) Rule 11, court of errors.
(2) Ibid.
(3) *Irving* v. *Dunscombe*, 2 Wendell, 205.
(4) Rule 26.
(5) *Waters* v. *Travis*, 8 Johns. Rep. 566.
(6) Ibid.

practice to employ a solicitor or attorney in this court, yet there can be no doubt of the right of the party to appoint a new solicitor upon the appeal, on whom service should be made.(1)

The cause cannot be entered on the calendar of the court, until after the petition of appeal, and the defendant's answer thereto have been filed.(2)

18 Answer of respondent.

The respondent may put in his answer to the petition of appeal, at any time after it is filed in the court below, and without waiting for the actual return thereof to the clerk of the court of errors.(3)

This answer would of course be transmitted with the petition to the clerk of the court of errors, if filed with the register, &c. in the court of chancery. But I presume that it would be regular to file it with the clerk of this court. For the form of an answer, see Appendix No. 219.

If there is no answer filed to the petition of appeal within the time prescribed, the appellant may, it appears, move for an order that the order or decree appealed from, be reversed, and for such further direction as grows out of such reversal.(4)

This is not however an order of course, but must be applied for to the court. It appears that such orders have been made without notice.(5) It may be suggested whether this is proper. By the practice of the House of Lords, an order is entered to answer by a certain day, and upon default, a peremptory order is obtained. If this is not complied with, an application is made to the House for an order to hear the cause *ex parte*.(6)

18 Amending appeal. Adding parties to an appeal.

It appears to be the rule in England, that if the want of proper parties to the appeal, or any other defect is discovered at any time before the hearing, the appeal may be amended by an order of the house upon petition.(7)

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(1) See *McLarren* v. *Charrier*, 5 Paige, 532.

(2) *Woodcock* v. *Bennet*, 20 Johns. Rep. 501.

(3) Rule 7, court of errors.

(4) *Chamberlin* v. *Fitch*, 2 Cowen, 244. *Waters* v. *Travis*, 8 Johns. Rep. 566, Rule 11.

(5) See the cases in note 4. The former 11th Rule was the same as the present.

(6) Smith's Practice, vol. 2, p. 40.

(7) Sidney on Appeals, 93, 94. The order of 1823, (Palmer, App. p. 100,) indirectly sanctions this practice, by directing that supplemental cases shall be delivered, (if cases have been printed), where any person,

No appeal can be amended without the order of the House of Lords. If the day of hearing is at hand, costs will be given to the respondent. For the form of a petition to amend, see Appendix, No. 220.

It probably should be to amend the appeal in the court below, and the petition of appeal in the court above.

The usual notice of the motion must be given under the 22d rule.

The respondent may apply to amend as well as the appellant. He has an interest that all the proceedings be carried on without errors or defects.(1) If he petition, the prayer should be that the appellant may be ordered to amend his appeal in the particulars set forth. If the respondent has answered, and an appeal be amended, a new answer should be put in to the amended appeal. An order of the court is however requisite for this purpose, and the respondent ought to have his costs awarded him. The respondent may petition for leave to withdraw the one answer, and put in another. If he omit to do this voluntarily, the appellant may have an order to compel an answer as to the original petition of appeal.(2) But I apprehend that, where the rights of the defendant are not varied by the amendment, a practice similar to that upon amending a bill may be adopted, and the order made upon the petition to amend may be, that as no further or other answer appears necessary, the answer filed to the original shall be deemed the answer to the amended petition.(3)

19 Waiving appeal.

If a party proceeds upon an order from which he has appealed, it will be considered as an abandonment of it.(4)

20 Dismissing appeal for irregularity.

A respondent should not put in an answer to an appeal which is irregularly filed, but should move to dismiss or quash it; otherwise he will lose his costs.(5)

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a party in the court below, has been omitted to be made a party on the appeal, and shall by leave of the house upon petition or otherwise, be added as a party to the appeal. Besides Mr. Urquhart has the form of a petition to amend by adding parties. His work was published in 1773.

(1) Urquhart, Sol. House of Lords, p. 44.

(2) Urquhart, p. 45. Sidney on Appeals, p. 104.

(3) See Palmer, 41.

(4) Such is the rule in the court of chancery as to appeals from a vice chancellor. See *post* this chapter, § II. subd. 11.

(5) *Norbury* v. *Mead*, 3 Bligh's P. C. 261.

If the party has appealed against one part of a decree, *in a case where the title is not in issue*, he thereby virtually submits to the rest of it. He cannot afterwards appeal against other parts of the same decree. A counter petition should be presented to dismiss the appeal.(1)

It is said that an objection to an appeal that is filed after the time allowed should be taken by motion. It is too late to do so at the hearing.(2) This rule is well settled as to all objections of form. Answering is a waiver.(3)

21 Objection for want of parties.

In a late book of practice (Smith's Practice, vol. 2, p. 42,) it is stated, that where a defendant thinks he can rely on an objection for want of parties, he must make the objection in the court below, and will not be allowed to do it for the first time upon an appeal; citing *Mullins* v. *Townsend*, 2 Dow and Clark, 430.

But that case shows only, that if the parties are not essential, the objection shall not prevail. Lord Lyndhurst says: "Another objection made to the appeal was one founded upon a *point of form*; that certain persons ought to have been parties to the suit, who were not put in the bill as parties. That it seemed to him the objection ought to have been made in the court below, and it was too late when the case came before the house on an appeal."

The ground taken by counsel seems to explain the decision. They assume that it was contrary to the course of equity to declare former decrees erroneous, merely for the want of proper parties, when the persons seeking to set them aside had been either themselves parties, or had their interests properly represented.

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(1) *Norbury* v. *Mead*, *ut ante*. The words italicised are important. Lord Redesdale says, "As the party had the opportunity, if he thought fit, to have presented the appeal against the whole case, I think it would be extremely mischievous to permit a second appeal in such a case as this. If it was a decree which concluded the title, that might be a question of separate consideration; but as it is a decree which does not conclude the title, I think there is no reason for permitting a second appeal." So the Lord Chancellor says: "Whether if the title had been brought in question the appeal would have been received, I desire to withhold my opinion. That is a question of great importance." Our reports are full of such motions. *Disbrow* v. *Henshaw*, 8 Cowen, 349. *Jenkins* v. *Wild*, 14 Wendell, 539.

(2) Per Sutherland J., *Disbrow* v. *Henshaw*, 8 Cowen, 353.

(3) *Rogers* v. *Cruger*, 3 Johns. Rep. 564.

The position must, I apprehend, be qualified by the general rule of the court of chancery. If that court perceives that it cannot make a proper decree for want of the right parties, the objection is never too late; it may be made at the hearing; nay the court has made it of its own accord after or at the time of a hearing. The rule must be the same in this court. In *Handcock* v. *Shaen Colles' Ca:* in Par. 122, the decree was reversed, "*the court of chancery in Ireland having proceeded to hear the cause without proper parties*, but without prejudice to the title of the respondent."

The order in that case is instructive. The Earl of Kildare was the party who should have been before the court. He united in the appeal, which was held erroneous, and his petition dismissed. It was then further ordered, that the respondent should forthwith amend his bill, and make the Earl of Kildare a defendant—that the appellant should procure the earl to appear and answer by a certain day, and in case he did not procure the earl to appear, and answer, and examine his witnesses by that day, so that the cause might come on as soon as might be, that then the decree should stand and be affirmed.

The court of errors can in general make no order in a cause on an appeal, until there is a return to the appeal;(1) that is, until the petition &c., is filed with the clerk of this court.

22 Abatement and change of parties.

If after the appeal is duly entered, an abatement occurs, and the addition of parties is requisite, this court may make such order as shall be necessary to revive the appeal and bring the cause regularly before it.(2) It may be suggested whether the

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(1) *Lott* v. *Roosevelt*, 9 Cowen, 526.

(2) The 28th general rule prescribes that the practice of the House of Lords shall govern the practice of this court in cases not otherwise provided for. In England, upon the death of a party, after an appeal, the cause is revived in the House of Lords. Sidney on Appeals, p. 110. Palmer's Prac. House of Lords, 80. Urquhart, 82. It is stated that it has been erroneously supposed, that it is necessary the cause should be revived in the court below as well as the appeal cause; but that the order of the house is silent upon that point, (order 20th March, 1823,) and that the practice is different. The appeal is revived here, and the house gives no directions as to reviving the cause below. No proceedings can be had however below, until the cause is there revived. Palmer, 81. Sidney, 110. In *Rogers* v. *Patterson*, 4 Paige, 409, one of the respondents and an acting executor, died after issue was joined in the court of errors. The argument was had, and decree pronounced

case of *Wilson* v. *Hamilton*,(1) is entirely consistent with the present practice of the court. At any rate there must be many instances in which this court can have the cause revived here, without remanding it, by applying its power to the dismissal of the appeal, or the reversal of the decree as for a default, or by hearing the appeal *ex parte*.

The practice, so far as there are recorded decisions of the court of errors, is yet unsettled; but the English rules, sanctioned to a great extent by the chancellor in *Rogers* v. *Patterson*, may afford a guide in most cases. In the first place, I conceive that if the abatement takes place, after the petition of appeal has been filed in this court, although before an answer to it is put in, the court has jurisdiction to make an order.(2)

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after his death. The chancellor reviews the practice of the House of Lords, and treats it as applicable to the case of an abatement of an appeal in the court of errors. In *Pell* v. *Tredwell*, September, 1836. In Error, after issue joined on the appeal, an abatement took place by the death of the original appellant. Upon petition it was ordered to be revived in the name of his executors.

In *Pyne* v. *Potter*, 5 Vesey, 305, Lord Chancellor said—When an appeal is abated in the House of Lords, the order to revive is obtained of course, and there is no fresh summons. By their practice a summons is issued for the respondent to appear and answer the petition of appeal.

(1) *Wilson* v. *Hamilton*, 9 Johns. Rep. 442. In this case while the appeal was pending, one of the respondents, *a feme sole*, married, and one of the respondents, and one of the appellants died. It was moved on behalf of the other respondents that the appellants bring in the proper parties, and proceed, or that the proceedings here be suspended. The court said: as this court does not possess original jurisdiction, so as to award process to bring in the parties whose interest has accrued since the appeal was filed, the cause ought to be remanded without prejudice to either party. The order made was to that effect. So in the case of *Evertson* v. *De Lavarque*, Oct. 1829, the appellant having died pending the appeal, on petition of the respondent it was ordered, that the cause be remanded to the court of chancery, to the end that the proper steps may be taken in that court to call in the parties whose interest have accrued by the death of G. E. the appellant, pending the appeal.

See next preceding note, and *Rogers* v. *Patterson*, 4 Paige, 409.

(2) In *Lott* v. *Roosevelt*, 9 Cowen, 526, it is said that the court has in general no jurisdiction to make an order until the appeal is returned. The return is the filing of the appeal and papers annexed under the 9th and 10th Rules. Then the order to answer may be entered, and I

Death of appellant.

If the appellant die pending the appeal, it must be revived in the name of his heir or representative. A petition for that purpose should be presented, stating the appeal, and the abatement, and the transmission of the right to the petitioner. See Appendix, No. 221. So much of the nature of the suit should be stated as to show that the petitioner holds the proper legal relation to sustain it, such as heir or executor. It would be proper to swear to it, by analogy to proceedings in the court below.(1)

This petition appears to be *ex parte*, and the order made upon it of course.(2) It may be suggested, whether it should not be part of the order that it be served forthwith upon the adverse party. Then he might be left to move to discharge it if wrongfully granted, or if there is no time for such a motion, the objection might be taken at the hearing. It seems to me that this would provide an effectual summary practice in ordinary cases.(3) But if there is a contest upon matters of fact arising upon such petition, I presume the cause must be remanded with instructions for the court of chancery to take proper measures to ascertain the point in issue. Under the Revised Statutes [2 R. S. 601, § 63,] upon an issue of fact on a writ of error, the record is remitted with directions to make up an issue. See also *Davis* v. *Packard*, 6 Wendell, 334. There is no similar provision as to appeals. But it appears to result from the general authority of the court. Mr. Palmer (Introduction, 63,) states that formerly the House of Lords has directed issues to try questions where doubts arose on certain facts

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presume any other order necessary to dispose of the appeal. So in Sidney on Appeals it is stated, that the general practice seems to be, where the cause abates previously to the appeal being *presented*, to revive the cause before the appeal is presented. (Paige, 110.) And upon writs of error before joinder in error. Palmer, 255.

(1) In Scotch causes it is usual to be prepared with proper vouchers to verify the statement of the petitioner. Palmer's Pract. 82.

(2) *Byne* v. *Potter*, 5 Vesey, 305. There is no trace in Urquhart, Palmer, or Sidney, of notice being given, or a copy of the order served. *Pell* v. *Tredwell*, Sept. 1836, *ut ante*.

(3) It is an invariable practice of all courts, that before an order of revivor is made absolute, some opportunity to contest it is given. Upon a bill of revivor this is by plea or demurrer. Under our statute, notice of the petition is served, and opposition may be made to it. In Virginia a plea to a *scire facias*, may be put in. 1 R. Code of Virg. p. 194; and so at law.

instead of remitting the cause to the court below and retained the appeal until after the trial. Now the practice is to send the cause to the inferior court, leaving it to that court to order the issues, and to give the directions consequent upon the result. Sidney, p. 35.

If the representatives of the appellant do not apply, I presume that the respondent may petition that the appeal be revived by the proper parties within a limited time after service of the order, or that it be dismissed.(1)

And I apprehend that the respondent may also present a petition for an order that the appeal be revived against the proper representatives of the deceased party.(2) If this last course is sanctioned by the court, it may be in many cases, far preferable to adopt it, than to procure a dismission. A question for example may arise whether a dismission for neglecting to revive, would bar a new appeal, if brought within the limited time. It is true that by the 15th rule, a decree of affirmance may be had upon the default of the appellant at the hearing. But this is contrary to the English course; [*Gardiner* v. *Simmons*, 6 Bligh's Rep. 60.] And the 15th rule does not in terms comprise the case in question. A decree by default is not pleadable in the court of chancery to a new bill. And see Palmer on Appeals, p. 43, as to the effect of withdrawing a writ of error.

Death of respondent.

If the respondent dies pending the appeal, his heir at law or personal representative may petition to be put in his place in respect of the cause; or the appellant may obtain a similar order.(3) It is said by Mr. Urquhart, p. 83, "that if the respondent does not apply, the cause will be heard *ex parte* the

(1) The three books of practice before noticed do not state any course of proceeding in this case. But the court has the clear right to regulate its practice and would in the absence of English precedents, adopt in general that of the court of chancery. In *Pell* v. *Coon*, 1 Hopk. 450, it was settled in our court, that if one of several complainants died, the survivors might elect to proceed or not, and the court on the application of a defendant will direct that if the suit is not revived within a limited time, it be dismissed. See also, *Leggett* v. *Dubois*, 2 Paige.

(2) By the English practice, if a *respondent* dies, and his representatives neglect to revive, the *appellant* may have an order to make them parties. Urquhart, 84. Palmer, 80.

(3) Palmer, 80. Sidney, 112. Urquhart, 84.

appellant, whose privilege it is to push on towards a hearing." I do not find this supported by the other authors. And probably if the court of errors was apprized of the change of parties, it would not proceed.(1)

It has been decided by the chancellor, that where a cause was argued and decided in the court of errors, and remitted to the court of chancery before the death of a party was known, the lower court must carry the decree into effect, though not entered as of a day previous to the death of the party; and the suit must be revived below and carried on as if the party had died after decree.

He considers it proper practice to enter a decree *nunc pro tunc*, either where the abatement takes place after argument and before decision, or after the decision. He also has pursued and recognised the case of *The Bank of the United States* v. *Weisiger*, 2 Peters' Rep. 481, where the respondent died before argument, but his death being unknown, the appeal was argued, and decided against him, and the decree was entered as of the first day of the term, being previous to his death.(2)

Infant heir of dead appellant or respondent.

If the heir of the appellant or respondent who applies for a revivor is an infant, his *prochein amy* or guardian must unite in the petition.(3)

I submit that if the infant is an appellant, and the petition is to be on his behalf, any person may unite with him as next friend. The statute, 2 R. S. 446, appears to apply only to suits instituted in courts of original jurisdiction; and before that statute, any one might sue on behalf of the infant in the court of chancery.

If however the infant heir, &c., is to be respondent, or if the respondent petitions that the suit be revived, and the heir of the appellant is an infant, by analogy to the English and our own practice in chancery, an order of the court of errors to appoint a guardian *ad litem* would seem proper. The case of

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(1) See *Vroom* v. *Ditmas*, 5 Paige, 528. In *Owings* v. *Owings*, 3 Gill & Johnson, 1. An appeal was taken in the name of the only complainant, after his death. His representatives appeared in the appellate court, suggesting the death, as did the adverse party. But the court held that the defect could not thus be cured, and dismissed the appeal.

(2) See *Rogers* v. *Patterson*, 4 Paige, 409. *Vroom* v. *Ditmas*, 5 Paige, 528.

(3) Palmer's Practice.

Wells, Heirs v. *Winfree*, in *Virginia*, shows the course of proceeding there.(1)

23 Cross appeals.

Objections to a decree on the part of the respondent ought to be brought before the court by a cross appeal. It is not open to him to have the decree modified in points not involved in the original appeal, upon the hearing of that appeal.(2) There are cases where the original appeal has been dismissed, and relief granted under the cross appeal; and sometimes both the appellant and respondent have in part succeeded in their respective appeals.(3)

By an order of the House of Lords of March, 1763, a cross appeal must be filed within one week after an answer put in to the original appeal, or the same shall not be received.(4)

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(1) The suit abated by the death of the appellant, and the *scire facias* to revive was served on two infants. On motion of the respondent, a guardian *ad litem* was assigned them by the court, and notice was served upon the person appointed. Upon proof of this service, a motion was made to take up the cause, but no counsel appearing for the infant, a time was given to the guardian to decide if he would act as such or not. It was observed by Judge Brookes, that the infants here were not plaintiffs, but defendants to the *scire facias*.

(2) *Clowes* v. *Dickenson*, 8 Cowen, 330. Per Jones, Ch., Spencer, J., p. 331. Urquhart, 37. Sidney, 96. Mr. Palmer, p. 33, says—As the appellant in the original appeal seeks a reversal or variation of the decree or order on the ground of its having taken from him too much, or given him too little, so the respondent by the cross appeal aims at a reversal or variation of such decree or order, on the ground of its having given the appellant too much or too little to himself. Urquhart, p. 37, (and followed by Mr. Sidney, p. 96,) states a case proper for a cross appeal which well illustrates its office. A. files a bill to recover an estate insisting that he is entitled to it under a conveyance made by B., and also under another deed made by C. The defendant avers that he is in possession under a title derived from D., the admitted original owner, from whom all make title, and that neither B. nor C. had power to make the conveyances under which the complainant claims. The court below decrees that the plaintiff is entitled under the deed of B., who was not restrained from aliening, but not under the deed of C., who was so restrained. The defendant appeals, complaining of the decree for declaring that the complainant is entitled under the deed of B. On this appeal, nothing can be argued but the validity of the claim under the deed of B. If the plaintiff wish to bring his right to the estate before the court under the deed of C., he must file a cross appeal.

(3) Palmer's Practice, House of Lords, 33.

(4) Urquhart, 40. Chancellor Jones, in *Clowes* v. *Dickenson*, 8

It is stated by Mr. Urquhart, p. 39, that the practice was unsettled whether a recognizance for costs must be given on a cross appeal. He states his own opinion to be that it is not necessary. The order of 27th January, 1710, of the House of Lords, does not require it. (Palmer, 26,) Mr. Palmer agrees that it is not now necessary, and states that the clerk of the House of Lords does not require it. [Ibid. p. 34.] It may be added in illustration, that in Ireland, security is not required from a non-resident defendant who brings a cross bill. (*Ante*, vol. 1. p. 204.)

Still it may be a question of much moment whether the provisions of the Revised Statutes do not apply to a cross appeal. It would be most prudent to follow them by giving the bond, &c., until the question is settled.

For the form of a cross appeal, see Appendix, No. 222. It should be signed by counsel;(1) filed with the clerk of the court of errors, and probably under the 26th rule, an order to answer it may be entered of course. Service of the order to answer upon the solicitor of the appellant in the original appeal is good.(2)

The answer to a cross appeal is in the same form as that to the original appeal, varying the caption.

24 Case. In every cause upon appeal, a case shall be made and printed for the use of the court, and unless the parties agree upon a case containing a more brief statement of the pleadings and proofs, such case shall contain the petition of appeal, and the answer to the same, the decree or order appealed from, and the reasons of the chancellor, together with such of the pleadings, orders, depositions, affidavits and other papers in the cause or matter before the chancellor, and upon which the decree or order appealed from was founded.(3)

If the case is a joint one, the pleadings, &c. will be abridged

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Cowen, 330, says that the respondents might have brought their cross appeal even after the appellant's appeal was filed.

Allen v. *McGuire*, stated Palmer Pr. 101. Lord Eldon and Lord Redesdale approved of allowing a cross appeal *nunc pro tunc*, where the respondent was in prison. So at p. 34, he says that the house will grant leave to present it *nunc pro tunc*, if good cause be shown for the omission.

(1) Palmer, 34.

(2) Ibid. 34. Urquhart, 40.

(3) Rule 12.

as the solicitors think advisable, but if it is not jointly made up, the pleadings, &c. should be set forth verbatim. It should contain also, a history of the proceedings similar to a case made for a hearing below. See the form of a case, Appendix, No. 223.

The appellant, as a general rule, makes up the case, and furnishes the copies; but the respondent may do it, provided he gives a written notice to the adverse party of his election to do so.(1)

Evidence set forth.

Although the rule directs the depositions to be printed, yet it is competent for the court to hear evidence used in the cause below, though not printed.(2)

By an order of the House of Lords of the 19th April, 1698, the case must be signed by one or more of the counsel who attended at the hearing in the court below, or who shall be of counsel at the hearing in that house. And Chancellor Walworth has allowed a fee for two counsel to be taxed.(3) The fee bill permits, but does not require two counsel.

25 Points.

Each party at the commencement of the hearing of the appeal, shall deliver to the members of the court, printed copies of the points he intends to rely upon in his argument.(4) And the party shall also cause to be printed and added to each point, a reference to the authorities on which he relies in support of the cause.(5) See the form, Appendix, No. 224.

26 Notice of argument.

The cause is at issue when the answer of the respondent is filed. The cause may then be brought on for argument upon the notice of either party.(6)

The notice of argument must be served at least fourteen days before the day on which it is intended to bring on the same, and

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(1) Rule 12.

(2) A similar order as to the proofs was made by the House of Lords, 24th February, 1813, directing that the printed cases should contain a copy of so much of the proofs taken in the court below as the parties intend to rely on at the hearing, [Palmer Pr. 50.] Lord Eldon in *Stackpool* v. *Stackpool*, 4 Dow, 222, said "that the rule was made by the House for the purpose of guarding itself, but that it is competent for the House to hear evidence not printed, if it think proper. The parties are to print what they think material; but in such a case as that, it was too much to suppose that any one could infallibly say what was, and what was not material."

(3) 2 Paige, 188.

(4) Rule 12.

(5) Rule 30, December, 1836.

(6) Rule 14.

which shall be some day on which the court shall be in session.(1)

A question has occurred in practice, whether under this rule causes ready before the day regularly appointed for a session of the court, but not noticed, may be noticed for any day, on the supposition that the session will continue so long! The custom has been, I understand, to get causes ready and notice them and put them down on the calendar, during the session of the court. If the court remains in session the cause will be heard. It will go on the calendar after those regularly noticed for the first day, even though the issue is earlier.

A copy of the notice of argument shall be furnished to the clerk of the court, at least four days before the day appointed for argument.(2) See Appendix, No. 225, for the form of the notice.

27 List of causes. The clerk is to make a list of the causes noticed, arranging them in the order in which the answer to the petition of appeal was filed, and when the court is ready to proceed to the hearing of cases, the same shall be called in the order in which they stand on such list.(3)

28 Paupers. An appeal may be prosecuted by a party *in forma pauperis.* A petition must be presented accompanied with an affidavit of poverty. In England it is, that he is not worth the sum of five pounds, wearing apparel and the matters of the cause only, excepted.() See ante Vol. I. p. 67.

29 Preliminary questions. When any preliminary question not made in the court below, and not involving the merits of the cause, is presented for argument, it shall be first argued and passed upon by the court; and the argument upon the merits of the cause shall be postponed until such preliminary question shall have been disposed of by the court, unless the court shall otherwise direct.(5)

Under this rule, it is the course to raise, when the cause is called, any question as to the regularity of the appeal, time of its being filed, neglect of any requisition of the statute or rules, or as to the character of the order appealed from. It is however, very common to make a distinct motion to dismiss the appeal,

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(1) Rule 14. (2) Ibid. (3) Ibid.
(4) Urquhart, 84. (5) Rule 16.

which can be heard on any regular motion day during the session of the legislature; and in the case of *Rowley* v. *Van Buthuysen*, 16 Wendell, J. Bronson considers this the regular course.

30 Hearing.

At the hearing not more than one counsel shall open the argument, and no more than two counsel shall answer, and no more than one counsel shall reply or close, except in special cases on appeal where there are distinct parties on the same side, having distinct interests in question.(1)

The court will not commence the hearing of a cause unless there are present twenty two senators, who are competent to vote upon the question of affirmance or reversal.(2)

The chancellor may state his opinion upon any matter which may arise on the hearing of the cause, but shall not have a voice in the decision of the court on any question arising on such appeal.(3)

31 Default of appellant.

No *ex parte* argument will be heard in favor of the affirmance of a decree.(4) The respondent may place the cause on the calendar, and notice it for argument. If then the appellant does not appear, the decree will be affirmed with costs, together with such damages as the respondent would have been entitled to, if the decree had been affirmed on argument.(5)

So, if the appellant does not furnish cases, as required by the rules of the court, the decree shall be affirmed with costs.(6)

32 Default of respondent.

The 28th rule provides that when a decree is affirmed or reversed by the default of either party, the remittitur shall not be sent to the court below, until the expiration of ten days thereafter, unless otherwise specially directed.

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(1) Rule 21. (2) Rule 30. (3) Rule 31. (4) Rule 15.

(5) Rule 15. In England, the rule is different. The respondent cannot in such a case have an affirmance of the decree, but only a dismissal of the appeal with costs. *Gardiner* v. *Simmons*, 6 Bligh's P. C. 69. An appeal came on for hearing, when counsel appeared for the respondent, and asked for an affirmance of the judgment. But no counsel appearing for the appellant, it was observed by the Lord Chancellor that the appeal might be dismissed for want of appearance; but that the judgment could not be affirmed unless the case was stated, and the House upon consideration deemed it right. The matter was postponed until the costs were furnished, when an order was made that the petition and appeal be dismissed, and that the appellant pay the respondent £100 costs.

(6) Palmer, p. 69.

This might seem to imply that the decree may be reversed upon the default of the respondent without any argument. And in *Waters* v. *Travis*, 8 Johns. Rep. 566, Mr. Riggs having moved that the cause be heard *ex parte*, upon a default in not answering the petition of appeal, and not attending to argue the cause, the court said, they did not hear arguments *ex parte;* and the appellant must take a judgment by default; and it was then ordered that the decree be reversed. So, in *Chamberlain* v. *Fitch*, 2 Cowen, 243, the order entered upon a neglect to answer a petition of appeal was a reversal of the order made below. This is contrary to the settled doctrine of the House of Lords, and against the chancellor's decision upon appeals to him from the vice-chancellors. The rule in these tribunals is, that the court above must be satisfied that the decree is wrong. It must be proven to it that there is error in the decision.

The 28th rule might be construed to mean, that where the decree is affirmed and the appellant has neglected to appear, or reversed, and the respondent has made default, upon the argument, the remittitur shall be suspended. This gives an opportunity to the party to move in this court to set aside the default. It was before observed that in England, if the peremptory order to answer the petition is not complied with, the appellant applies to the house for an order to hear the appeal *ex parte*, ante p. 35.

33 What other orders, &c. may be revised on an appeal.

It is the general rule that only such parts of a decree as are complained of in the petition of appeal will be decided upon by this court.(1) But it is also a general rule, that upon an appeal from a final decree, all prior orders connected with such decree and which will be affected by the decision above, are brought up for revision.(2) This principle is adopted in England,

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(1) *Sands* v. *Codwise*, 4 Johns. Rep. 601. C. J. Kent.—"I think it a rule of practice from which we ought not to depart, that when the petition of appeal recites specifically the parts of the decree of which it complains, and from which the appeal is made, the appellant is to be confined to those parts." The decree had directed a feigned issue, and that part was not complained of in the appeal.

(2) *Atkinson* v. *Manks* and *Holroyd*, 1 Cowen, 691. This case is instructive upon the principle laid down in the text. It was a bill of interpleader. It was brought to hearing on bill and answers. A decree was made that the bill was properly filed, and by submission of the defendants, instead of the usual decree to interplead, an order of re-

where liberty has been given to amend a petition of appeal by extending it to other orders than the one complained of, they

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ference was made to state an account between the parties. To the master's report various exceptions were taken, certain of which were allowed, and a final decree made. The appeal was from the part of the first decree adjudging the bill rightly filed, decreeing the account, and so much of the final decree as allowed the exceptions, and as awarded costs to the complainant. It was stated by Justice Sutherland, that he considered the first decree final as to the complainant. But it was unnecessary to sustain the appeal on this ground, as the appeal from the final decree opened for consideration all prior orders and decrees in any way connected with it, and the question whether the bill was properly filed, was necessarily drawn into consideration by the appeal from that part of the decree giving the complainant costs.

In *Jaques* v. *The Methodist Church*, 17 Johns. Rep. 559, Ch. J. Spencer lays down the same rule; and cites with approbation, the observations of Mr. Justice Radcliff in *Le Guen* v. *Governeur*, 1 Johns. Cas. 498, to the same effect.

In *Kane* v. *Whittick*, 8 Wendell, 231, J. Sutherland, after deciding the case upon the ground before noticed says, that even if the decree of 1829 had not been by default, he would have entertained very serious doubts whether an appeal from such a final decree would open the prior interlocutory order of 1828. He accedes to the doctrine of Ratcliff, J. in *Le Guen* v. *Governeur*, and adds that the reason there assigned for the rule shows its extent and limitation: all antecedent proceedings must be brought up, and may be considered by the court, because it may become indispensable to reverse, alter or modify them, in order to make them consistent with the decree to be pronounced. In speaking of *Jaques* v. *The Methodist Church*, he considers that the principle of J. Radcliff was carried beyond its legitimate extent; and observes that the observation of Mr. Jones is just that, if the principles contended for in that case were to prevail, then every interlocutory order made in a cause may be appealed from within five years after the final decree is pronounced, although the statute has limited appeals from interlocutory orders to fifteen days.

Senator Allen considered the decree of 1828 as final. Senator *Beardsley* stated that it seemed to be conceded on the argument, that if the decree of 1829 had not been taken by default, and been appealed from, it would have opened the previous decree for consideration. He held the decree interlocutory. Senator Maynard stated that he supposed the admission on the argument to be the same as that of Senator Beardsley. This case, in my opinion, can scarcely be considered as overturning *Jaques* v. *The Methodist Church*.

To these cases may be added the decision of the chancellor upon an appeal from a vice-chancellor, in *Mapes* v. *Coffin*, 5 Paige, 296. There the decree made in two causes which were heard together, established

being so connected with that order that justice could not be done without reviewing them.(1) The above stated rule must therefore, it is presumed, be understood with the qualification, that if other parts of a decree are necessarily affected by the decision of the part appealed from, they must be considered and passed upon, though not specified in the petition of appeal.

34 Decision.

The president of the senate is entitled to vote upon a question, and express an opinion, equally with the other members. The same rule applies to a president *pro tempore*.(2)

If the court is equally divided, the decree must be affirmed. Such affirmation cannot, however, be considered as settling the

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the lien of the complainant in one, upon a certain policy of insurance for the satisfaction of his judgment, and that it had a priority over the claim of the plaintiff in the other of the causes. A feigned issue was ordered to ascertain the liability of the company and amount of loss. This being ascertained at a certain sum, the court decreed the amount to be paid to the complainant in the first suit; and the bill in the second to be dismissed. This decree was appealed from. The chancellor said, the question of priority was distinctly decided and decreed against the appellants in September, 1830, (date of first decree,) and if they were not satisfied with the decision, they should then have appealed. An appeal from a final decree only, cannot bring up a question which has been definitely adjudicated and disposed of previous to the time of making such decree. See also *Wilson* v. *Troup*, 2 Cowen, 208; *Lomax* v. *Picott*, 2 Randolph, 249, and *Price's Executors* v. *Nesbit*, 1 Hill's Ch. Rep. 457.

In *The Bank of Orange County* v. *Fitch*, March 6, 1838, upon an appeal from a decree of a vice-chancellor, the court held that an appeal from a final decree more than nine months after the entry of an interlocutory order, does not have the effect of bringing up the merits of such interlocutory order for examination.

The point is excessively confused with contradictory opinions and decisions.

(1) *Bouchier* v. *Dillon*, 5 Bligh's Rep. N. S. 688. On a rehearing of a cause, the court directed the party to specify the objections he had to a certain account. This was done, and upon hearing the objections, the most were overruled, but liberty was given to go before the master as to some of them upon certain conditions. The party obtaining the rehearing, appealed; and the petition complained of that order only. The appellant submitted to the committee on appeals, that some of the prior orders were so connected with the order in question, that it was impossible to do justice to his case without extending his appeal to those former orders. He was allowed to amend his petition of appeal for that purpose.

(2) Case of Lieutenant Governor, 2 Wendell, 215.

law in this court, except as relates to the particular cause.(1) The mode of putting the question is, shall this decree be reversed, and if a majority of the court do not vote for a reversal, the decree is of course affirmed.(2) A decree may be affirmed or reversed if ten members concur in the decision, provided there be present at the decision nineteen members. The case will be disposed of by such a vote, even although the nine do not vote, or had not heard the argument.(3)

35 Decree.

If the decree is simple, such as mere reversal or affirmance, the clerk draws it up. In very special cases some member of the court frequently prepares the decree. Such was the case in *Hawley* v. *James*, 16 Wendell. If counsel attend, as in a case of complexity it is advisable to do, they settle the decree among themselves, and if any controversy exists, the court will hear the drafts, and decide on the last day of the session. See Palmer, 69. For the forms of ordinary decrees, see Appendix, No. 226.

If the death of a party to the record has occurred between the hearing and decision, the decree may be entered as of the day of hearing.(4)

36 Remittitur.

The statute directs that when an appeal shall have been heard and determined, all the proceedings, together with the decree or order therein, and all things concerning the same shall be remitted to the court of chancery; where such further proceedings shall be had as may be necessary to carry it into effect.(5)

By the 18th Rule of the court, the remittitur shall contain a copy of the decree or order annexed to the petition of appeal, and the matters thereto annexed as brought into this court, under the seal of this court, and signed by the clerk.

The costs which are awarded by this court, are to be taxed by a taxing master of the court of chancery; and when thus taxed are to be inserted in the decree sent down, and payment shall be enforced according to the practice of the court.(6) It is held, however, that the costs need not be inserted in the re-

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(1) *Bridge* v. *Johnson*, 5 Wendell, 371. (2) Ibid.
(3) *McFarlen* v. *Crary*, 6 Wendell, 325.
(4) *Murray* v. *Blatchford*, Dec. 21st, 1828, clerk's minutes.
(5) 2 R. S. 167, § 29.
(6) Rule 19 court of errors.

mittitur before it is sent down. It may be done after it is filed in the court below.(1)

When a decree is affirmed or reversed by the default of either party, the remittitur shall not be sent to the court below until the expiration of ten days thereafter, unless the court shall specially direct otherwise.(2) The clerk of the court of errors makes out the remittitur. The solicitor of the prevailing party obtains it from him. His proceedings with it are stated post sub. 40. For the form of a remittitur, see Appendix, No. 227.

37 When jurisdiction of the cause is lost.

By the 28th Rule, as before noticed, the cause is retained for ten days after a decree by default, and of course no difficulty exists in moving to open the default. And by the operation of the 18th and 19th Rules, a short time must elapse before the remittitur can be sent down, as the decree must be entered. It is the general rule of the court, that it has no longer jurisdiction over the cause, if the remittitur has been regularly issued and filed with the officer of the court of chancery.(3)

But if the remittitur has been irregularly sent down, the jurisdiction over it is not lost. It may be brought back to this court, and the error corrected.(4)

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(1) *Legg* v. *Overbagh* 4 Wendell, 190. (2) Rule 28.

(3) *Legg* v. *Overbagh*, 4 Wendell, 188, Chief J. Savage, J. Sutherland, and the Chancellor, laid this down as the rule. J. Marcy thought it did not depend upon the question of regularity, but upon the fact whether the court had obtained jurisdiction of the cause, and whether the circumstances of the case were such as that justice required the interference of the court. In this case, a decree had been affirmed by default of the appellants, their counsel being prevented by sickness from attending. The chancellor had stayed the enrolling of the decree. The only alleged irregularity was, that the costs of the appeal were not inserted in the remittitur, which was held not necessary.

(4) Ibid. *Waters* v. *Travis*, 8 Johns. Rep. 566. The irregularity was, that the respondent had not been served with a copy or notice of the order to answer the petition of appeal. The decree was reversed for a default in not answering. The record, it appears, had been remitted. The court of errors first stayed proceedings, and after hearing argument, set aside the decree for irregularity.

Chamberlain v. *Fitch*, 2 Cowen, 543. A decree by default, for not answering the petition, was set aside upon the ground of a stipulation between the solicitors, of which the entering the default was a violation. The order directed the register to send back the papers, &c.,

38
Rehearing appeals.

It is a general rule of the House of Lords, and one rarely deviated from, not to permit a rehearing of a cause or any point of a cause which has been discussed and decided, or which there was a proper opportunity to have discussed.(1)

This rule was formerly less strictly adhered to than it is at present. Mr. Palmer [Intr. p. 38] has collected a large number of examples of applications which amounted to a rehearing.(2)

It should be observed that the decisions of the court as to the termination of its jurisdiction over a cause upon the remittitur being duly sent to the court below, would limit this right as to time, should the court even be disposed to permit a rehearing at all. See ante sub. 37.

In the case of *Van Kleeck* v. *The Protestant Reformed Dutch Church*, January, 1839, the court made an order that the remittitur should not be sent down until further order. An attempt was made to obtain a rehearing, the court being equally divided upon one point. It was however unsuccessful, and a general rule was adopted February 7, 1839, that this court will not order a re-argument, nor will it reconsider any case on the ground that it was decided, on an equal division of the members of the court, or for any other reason, after the cause has been decided here upon the merits.

39
As to points not taken below.

It was before observed, that this court will not decide an appeal upon a ground which has not been passed upon, or submitted to the court below. This position requires some further explanation.

In a case before the privy council on an appeal from a decision of a court in Demarara,(3) counsel cited a case of *Campbell* v.

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which were remitted to him. See also, *Evertson* v. *Booth*, 20 Johns. Rep. 500. *Murray* v. *Blatchford*, 2 Wendell. 221.

(1) Palmer, Intr. 59; Sidney, 41. *Foley* v. *Burnell*, 1 Br. C. R. 286; *Bernal* v. *Marquis of Donnegal*, 3 Dow, 157. The judgment was pronounced July 29, 1814. Some errors had been made in drawing it up, and upon petition stating that counsel had additional reasons to urge, liberty was given for one on each side to attend. Lord Eldon observed, that this was not meant as a rehearing, but only to correct errors. Mr. Leach attempted to go into the merits, stating that they had not been argued, the cause resting upon a point of form. Lord Redesdale said, the House was not to have its judgment reviewed, merely because counsel may have omitted to make observations.

(2) Palmer, 59–62. Remarks of Lord Holles, cited p. 59.

(3) *Frankland* v. *McGurty*, 1 Knapp, 274.

Fowler, which he stated at length, to show that where an objection arises upon the record, it had been allowed to be taken before the privy council, though not taken in the court below. The master of the rolls said, it would be very inconvenient if such a rule was adopted with regard to legal proceedings in other countries. It is very well in courts of appeal in this country, because the supreme court and the inferior court proceed according to the law of this country; but in an appeal from a foreign country, it does not follow, that the law of England is to be applied. If the objection had been taken below, it might have been explained, either by the law of the country, or the usage of the country.

Chawly v. *Lord Dunsaney*, 2 Sch. & Lefoy, 712. An account was considered by Lord Eldon as necessary or proper in the case. But he says, "that upon reading the record, he finds that no such account was looked for by any of the parties. If this cause had been heard in England, no client could have induced his counsel to make that point at the bar under such circumstances; because such counsel having been previously conversant with the cause, would have known, that as it was not made below, it could not be made by way of appeal."

In *Beekman* v. *Frost*, 18 Johns. Rep. 558, Ch. J. Spencer adverts to many cases in this court, and says, "The principle to be extracted from them I believe to be this, that no party shall be allowed to surprise or mislead his adversary: if counsel for the first time raise a point here which might have been obviated had it been made in the court below, he ought not to be permitted to do so." He instances the strong case of *Gelston* v. *Hoyt*, 13 Johns. Rep. 562, and proceeds, "But where a cause has been defended in the court below, and comes here for review, and a point is made here which could not be obviated in the court below by proof or amendment, this court ought not to refuse cognizance of such point." The chief justice proceeds with a train of admirable reasoning to illustrate this position.

But the reasoning may be applied to a case beyond his position. Suppose the point is newly taken, and yet is susceptible of correction or proof, had it been made below, is the court to refuse to listen to it? That seems inconsistent with the provision of the law, that the court shall examine all errors which may be assigned or *found* in the order or decree appealed from.

It has been suggested, that if a case of this description arose, the cause might be remanded.(1)

Another question has sometimes arisen. What is to be the proof of a point having been made in the court below? The decree of course is the first and best; the opinion is the next. But the opinion may have omitted to notice it, the cause being decided upon another ground. I presume the opinion could scarcely be conclusive.

40 Proceedings in the court below.

The clerk of the court of errors having sent the remittitur to the register of the court, a motion should be made in term, or on any regular motion day, that the decree of that court be made a decree or order of this court, and be carried into effect.(2.)

It was in former years the practice of several leading practitioners in New-York, to bring the remittitur before the court, on some day in term, and move that it be filed, as well as for the order to carry it into effect. It was transmitted to the register or assistant register, as the convenience of the solicitor suggested, but was not considered or marked as filed. It is the course at the register's office in Albany to mark it as filed when brought in, and the court has ordered this marking to be stricken out, and the filing suspended till further order.(3)

In the case of *Hosack* v. *Rogers*, March 6, 1838, the chancellor settled the practice as follows: That the remittitur must be presented to the chancellor before it is filed, to enable him to see whether there is any special matter directed, which entitles the adverse party to be heard. The party to whom it is delivered may, however, in the first instance, give notice to the opposite party, that he will file the remittitur, and apply for

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(1) In *Murray* v. *Coster*, 20 Johns. Rep. 576—603, the cause was decided by the court of errors upon a point, not made in the court below, and but slightly noticed in the court above, though printed in the points. An application was made for liberty to amend the answer, or to file a supplemental answer below, in order to meet this point, which was denied. The point on which the court of errors determined the cause was, an admission in the answer sufficient to take the case out of the statute of limitations. Woodworth, J., was in favor of granting it, and expressed himself of opinion, that the court had certainly the power to grant such an application, if a fit case was presented.

(2) *Attorney General* v. *Scott*, 1 Vesey, Sen. 419.

(3) *Murray* v. *Blatchford*, 2 Wendell, 221.

such order or decree as he considers himself entitled to. This motion may be made on any regular motion day. For the form of the order, see Appendix, No. 228.

41 Costs.

Upon an affirmance of a decree, costs are allowed, as of course. The costs in this court are not regulated by statute, but by the law of the English courts. Whenever the merits of the case are disposed of by the decree in the court of errors, it may adjudge as to the costs.(1)

Upon the reversal of a decree, costs are not allowed.(2)

Where there were two appeals from two distinct orders of the chancellor, and two cases printed, the court of errors directed that no allowance should be made for any part of the second case which was contained in the case made on the first appeal. It also consolidated the orders of affirmance, and made only one decree of affirmance as to both appeals.(3)

See further post, chap. 25, § 1, sub. 19.

SECTION II.

APPEALS FROM A VICE-CHANCELLOR.

1 Appeal from interlocutory order.

Any party complaining of any interlocutory or other order previous to a final decree, made by any vice-chancellor, may appeal therefrom to the chancellor.(4)

Such appeal must be made within fifteen days after notice of such order.(5)

An appeal must be brought by one who can be injured by the decision. It cannot be sustained by a mere volunteer for the benefit of others.(6)

The difference between this provision of the statute and that upon appeals to the court of errors has been before noticed. [Ante, Ch. 24, § I. sub. 9.] In a late case, *Farley* v. *Farley*,(7) it was again held, that if the appellant settles and delivers an order to the clerk to be entered, he must appeal within fifteen days from that date.

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(1) *Murray* v. *Blatchford*, 2 Wendell, 224. (2) Ibid.
(3) *Fulton Bank* v. *Beach*, September, 1829. See 2 Paige, 186.
(4) 2 R. S. 178, § 59. (6) *Steele* v. *White*, 2 Paige, 480.
(5) Ibid. § 60. (7) In chancery, 1838.

From the case of *Whitney* v. *Belden*, ante, Vol. I. 416, I conclude that these fifteen days only commence after notice has been given of the order having been duly entered, whenever the same may have been pronounced.

2 From final decree.

From final decrees an appeal must be made within six months after the decree has been entered in the minutes of the court, and such appeal may be made notwithstanding the decree may have been enrolled.(1)

As to the meaning of the phrase "entered on the minutes of the court," see Vol. I., p. 563, and *Whitney* v. *Belden*, 4 Paige, 140.

An important case in relation to the time for appealing from a final decree has lately been decided. *Barcley* v. *Brown*, in chancery, Aug. 27th, 1838. This was an application to dismiss an appeal from a final decree, on the ground that it was not entered within six months after the actual entry of the decree in the minutes of the court. The cause was heard in July, 1837; the decree settled and entered on the 26th of October, 1837; but the caption was of the day when the cause was heard, viz. in July. The defendant's solicitor sent a copy of the decree to the solicitor of the plaintiff on the 7th November, 1837, with a notice endorsed thereon that it was a copy of the decree entered in the cause. This notice was dated the 7th of November. The solicitor mistook the date of the notice for the time of the actual entry of the order, and did not perfect his appeal till the 5th of May, 1838, nine days after the six months had expired from the 26th of October. The respondent's solicitor, gave notice of his intention to furnish the papers upon the hearing, within the time allowed by the rule for that purpose, and before he was aware that the appeal had been entered after the time for appealing had expired. The chancellor held that the appellant's solicitor was not prejudiced by the mistake in the caption of the decree, as he knew it was antedated as of the time of the hearing before the vice-chancellor, nor by what had occurred in the clerk's office, as he had not examined the books to ascertain when the decree was actually entered. Had he done so, and been misled by any neglect or mistake of the clerk, it might be a sufficient ground for an application to the

(1) 2 R. S. 178, § 65.

vice-chancellor to have the decree re-entered with a corrected caption. That the caption unless otherwise directed must be made to correspond with the time of the actual entry of the decree or order. The register should see that the caption agreed with the time of actual entry. In all cases where a decree is entered as of a previous time, *nunc pro tunc*, it should appear either by an entry in the minutes of decrees, or in the minutes of the proceedings of the court, or in both, when it was actually entered.

The chancellor also said, that under the circumstances he would have relieved against the mistake, if the court had the power. But the time for appealing was limited by law, and the chancellor had no power to extend it upon a mere mistake of the party. That the respondent's notice that he would furnish the papers on the hearing did not amount to a waiver of the right to have the appeal dismissed, even if the parties could give jurisdiction to the court to hear an appeal not made within the time limited by law. The appeal was dismissed.

3 Mode of appealing.

Every such appeal shall be made by serving notice thereof on the solicitor of the adverse party, and on the register, assistant register, or clerk with whom the order or decree appealed from was entered.(1) This is done by delivering to the register, &c., a written notice, stating that such decree or order, or some particular part thereof to be specified in such notice, is appealed from. Within eight days thereafter, he must serve a like notice on the solicitor of the adverse party, or the appeal shall be considered as waived.(2) See the form, Appendix, No. 229.

But it must be carefully noticed that this clause, as to the eight days, applies only to appeals to the court of errors. The written notice must be given to the solicitor as well as the clerk, within the limited time, viz., the fifteen days or six months, according as the order or decree is interlocutory or final.(3)

If the party in whose favor an interlocutory decision is made, wishes to limit the time for appealing therefrom, he should

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(1) 2 R. S., 178. § 66. (2) Rule 117.
(3) *Eldridge* v. *Howell*, 4 Paige. 457.

draw up and enter the order, and serve a copy thereof upon the solicitor of the adverse party without delay.(1)

No petition of appeal addressed to the chancellor need be presented on appeals from orders or decrees of the vice-chancellor, and no transcript need be returned, but the original pleadings and other papers in the cause may, by order of the chancellor, and at the expense of the party procuring such order, be transferred from one office to another, as occasion may require, and the expense of such transfer may be taxed as a necessary disbursement.(2)

Tranfer of papers.

This order is special, and obtained upon an affidavit.

It is not necessary, however, to obtain an order for the transfer of the papers, except in those cases where an actual inspection of some exhibit or other original paper on file, would be necessary at the hearing, or where there are some other special circumstances which would render it proper that the original papers should be in court at the hearing. In ordinary cases the original papers and pleadings are not wanted for the use of the chancellor, as the appellant must furnish the court with copies of them.(3) The party should state in his affidavit the particular reasons which render a transfer necessary.(4)

Within the period fixed for appealing the party must make the necessary deposite, or file the bond required to be given as security for costs on such appeal.(5)

Bond and deposite.

This bond or security must be the same as is required by law on an appeal from a decree or order of the chancellor.(6) By the statute of appeals, the bond must be in the penalty of at least $250, with sureties to be approved of by such officer as the chancellor shall designate, conditioned for the diligent prosecution of such appeal, and for the payment of all costs and damages that may be awarded against the appellant thereon.(7) See the form, Appendix, No. 230.

As the officer by whom the bond must be approved, and the duty of such officer, and other points upon this subject, see ante, p. 26, sub. 12.

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(1) *Tyler* v. *Simmons*, in Chancery, March 7, 1837.
(2) Rule 19.
(3) *Eames* v. *Sanger*, 3 Paige, 556.
(4) Ibid. (5) Rule 117.
(6) Rule 116, as amended January 7, 1834.
(7) 2 R. S. 605, § 80.

The provision as to the approval on these appeals as before observed, is only a rule of court. Where, therefore, a party had notice for six months before he applied to dismiss an appeal, that the bond was approved by the wrong officer, his application was denied.(1)

As the amount of the bond, and mode of approval is regulated by a rule, and not by statute, the court may dispense with the strict letter of the rule. A new bond may therefore be allowed to be filed where the one filed is defective, or the approval improper.(2)

And the appeal bond may be amended by adding another surety where there is but one, upon the written consent of the obligors.(3)

A master, who has acted as solicitor or counsel in the cause or matter in which the appeal is taken, or whose law partner has thus acted, cannot regularly approve of the bond. But here also liberty will be given to amend by filing a new bond *nunc pro tunc*, or by procuring the same bond to be approved of by the proper officer.(4)

Where a vice-chancellor had made two distinct decisions in a cause, which were appealed from, it was considered proper practice to embrace both in one notice of appeal, and in the same bond, provided the condition of the bond was double the usual amount, and was sufficiently extensive to cover the damages and costs upon both appeals.(5)

A deposite may be made instead of a bond. See as to this, p. 28, sub. 13.

The necessary papers on an appeal are to be furnished by the appellant. But the respondent, or party principally interested in or entitled to the benefit of the order or decree, or the part thereof appealed from, may within four days after receipt of notice of the appeal, give written notice of his intention to furnish the papers, and may then do so.(6)

5 Papers to be read.

No papers can be read upon an appeal which were not read

(1) *Hawley* v. *Bennett*, 5 Paige, 104.
(2) *Eldridge* v. *Howell*, 4 Paige, 459.
(3) *Potter* v. *Baker*, 4 Paige, 292.
(4) *McLaren* v. *Charrier*, 5 Paige, 532.
(5) In Chancery, August 2, 1836. *Tyler* v. *Simmons*, MSS. Ch. Walworth.
(6) Rule, 94.

in the court below, or agreed to be considered as read, or offered and rejected.(1)

The party who furnishes the papers on an appeal, should procure from the clerk a certified copy of his minutes, to show that the proper papers are furnished by him, and should also be prepared to show, if necessary, that the papers furnished are the correct copies.(2)

The proper evidence of what papers were used before the vice-chancellor, or offered and rejected, is a certified copy of the clerk's minutes, whose duty it is to enter in the minutes a statement of the pleadings, depositions and affidavits read or agreed to be so considered, or offered and overruled. Where any mistake has arisen, the minutes may be corrected by application to the vice-chancellor. But he may not direct papers to be entered as read, which were not read or considered as before him.(3) The papers to be furnished are a copy of the decree or order appealed from, copies of the pleadings, abstracts, case, depositions, &c., on which the same was founded, a copy of the notice of appeal filed with the clerk, of the opinion of the vice-chancellor, and a copy of the minutes of the clerk, showing what depositions, pleadings, papers and documents were read or used, or offered to be read, and rejected.(4)

6 Place on calendar.

Appeals are to be placed upon the calendar, according to the date of the issue in the court below.(5)

7 Hearing the appeal, default of parties.

Upon an appeal, if the respondent does not appear, the decree cannot be reversed for his default. The counsel for the appellant must show in what the decree is erroneous, and what is the proper decree to be made, if that of the court below is wrong.(6)

The only effect of the neglect of a respondent to appear is to deprive him of his costs on the appeal, if the decree of the court below is affirmed; and to preclude his right to appeal to the court of errors, if the decision of the chancellor is against him.(7)

If an appellant does not appear at the hearing of the appeal, the court will presume the decision of the court below to be

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(1) *Studwell* v. *Palmer*, 5 Paige, 168.

(2) *Studwell* v. *Palmer*, 5 Paige, 168. (3) Ibid. (4) Rule 93.

(5) This is the settled construction of the 91st Rule. In Chancery, October 24, 1836, and other cases.

(6) *Stiles* v. *Berch*, 5 Paige, 132. (7) Ibid.

right, and will affirm the same with costs, without any argument upon the merits.(1)

An appeal from a final decree does not bring before the court for review a question which has been determined by an interlocutory decree or order previously made.(2)

If the appellant does not succeed in reversing any part of the decree, and the respondent has not brought a cross appeal, the court cannot reverse or modify the decree in a part in which it is erroneous as to such respondent.(3)

An appeal from a vice-chancellor to the chancellor is not in the nature of a rehearing, but is strictly an appeal, and no other evidence or pleading can be received than what was before the vice-chancellor.(4) Where the newly discovered evidence is in favor of the respondent, the course would be to hear the appeal upon the original testimony, and if the decision of the court below was found erroneous, and was reversed on that ground to ask the appellate court instead of proceeding to a final decree to remit the cause to the vice-chancellor with permission to the respondent to apply to open the rule for closing the proofs, that the newly discovered evidence might be introduced before a final decree was made, or that after the reversal of the decree the cause should be retained before the chancellor with a similar permission.(5)

It is provided by statute, that on the hearing of an appeal, the chancellor shall annul, affirm, modify or alter the order or decree appealed from or make any other order in the cause as justice shall require, and may remit the cause to the vice-chancellor who made the order appealed from for further proceedings, or may direct the same to be had before himself as the circumstance of the case may require.(6) Under this provision it has been held that where by an appeal, the whole cause is brought before the court, if the chancellor does not make a final decree, the whole case will remain before him for a decision upon the equity reserved, unless he shall think proper to remit it to the vice-chancellor.(7) But when the appeal is upon a

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(1) 5 Paige, 132. (2) *Mapes* v. *Coffin*, 5 Paige, 296.
(3) Ibid. (4) *Lenox* v. *Mitchell*, 14 Wendell, 662.
(5) *Wendell* v. *Lewis*, January 23d, 1837. MSS. Ch. Walworth.
(6) 2 R. S. 178, § 68.
(7) *Jenkins* v. *Henman*, 5 Paige, 309.

collateral matter not embracing the whole suit, the case is otherwise.(1)

Thus where a vice-chancellor had refused to dissolve an injunction, and had granted a receiver, on an appeal the order was affirmed, and the proceedings remitted.(2)

In the case of *Jenkins* v. *Hinman*, the vice-chancellor had directed an issue upon the hearing from which both parties appealed. And the chancellor entertained a motion for a receiver.

8 Death after an appeal.

The appellate court ought not to proceed to the hearing of a cause, after the court is aware that the nominal party on record is no longer in existence, unless with the consent of the counsel for those, who have succeeded to his rights.(3) But where after the entry of an appeal, the complainant died, and his death being unknown, the cause was heard and decided by the chancellor on the appeal, it was determined that the decree might be entered *nunc pro tunc*, as of the day previous to the death of the complainant, and after the entering of the appeal.(4)

9 Effect of an appeal.

It is provided by statute, that the chancellor by general rules, to be varied as occasion may require, shall prescribe the effect of all orders and decrees made by a vice-chancellor, either before or after notice of an appeal shall be given, in what cases, to what extent, and on what terms any such order or decree shall be suspended or effected by an appeal; the manner in which appeals shall be brought in to a hearing before him, and the papers and documents which shall be transmitted therewith, and by whom.(5)

Under this provision the 116th rule has been made, by which it is provided, that in all respects the provisions of the 80th section and the nine succeeding sections of the statute as to appeals to the court of errors must be pursued.

The provisions of the 80th section and practice under it has been before stated, ante, p. 26, sub. 12.

The other statutory regulations in the case of money decreed, &c., are also fully stated, ante, p. 29, *et seq.*

No appeal by a defendant from any interlocutory order or decree of a vice-chancellor, in a suit for the payment of money, or to compel the delivery or assignment of any securities, evi-

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(1) Ibid. (2) *Havens* v. *Hussey*, 5 Paige, 31.
(3) *Vroom* v. *Ditmas*, 5 Paige, 528. (4) Ibid.
(5) 2 R. S. 178, § 67.

dences of debt, documents, chattels or things in action, or for the delivery of possession of real estate, or a sale thereof, shall operate as a stay of proceedings for more than fifteen days from the time of perfecting such appeal, unless a special order for the stay of proceedings, be made by the vice-chancellor, or the appellant within the fifteen days shall have executed and filed a bond with two sufficient sureties in such penalty as the vice-chancellor may direct, and conditioned to pay the debt or damages which may finally be decreed against such appellant in the suit in case the appeal shall be dismissed, or the interlocutory order or decree so appealed from shall be affirmed.(1)

No appeal from any interlocutory order or decree of a vice-chancellor shall operate as a stay of proceedings for any time, unless a special order to that effect be made by the chancellor, or unless the appellant at the time of entering the appeal shall, in addition to the deposite or security required in such cases, procure and file with the clerk a certificate of the vice-chancellor that there is probable cause for appealing; that the order or decree appealed from involves the merits of the cause or some part thereof; and that it is reasonable and proper that the questions arising on such appeal should be decided by the chancellor before the final decree in the cause, and before any further proceedings are had on such interlocutory order or decree before the vice-chancellor.(2)

As to the effect of an appeal in bringing up previous orders for consideration, see ante, p. 48, sub. 33, especially *Mapes* v. *Coffin*, and *Bank of Orange County* v. *Fink*, cited in the note p. 50.

10 Appeal where an injunction is dissolved.

Where an injunction is dissolved by a vice-chancellor, an appeal does not uphold it, nor even the certificate of such vice-chancellor. But he may, if he deem it a proper case grant a special injunction to continue until the appeal is heard.(3)

Such an injunction is a new original injunction, and therefore if there is a suit at law to be restrained, all the provisions of the Revised Statutes as to security or deposite apply. It is exactly as if there was an original injunction then applied for.(4)

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(1) Rule 116. (2) Rule 116.

(3) *Hart* v. *Mayor of Albany*, 3 Paige, 381. And in Chancery October 24th, 1836.

(4) This was settled by the chancellor in the case of *Greaves* v.

If the appellant proceed to carry into effect the order from which he has appealed, it will be considered as an abandonment. But application must be made, and to the vice-chancellor, to compel him either to abandon his proceedings, or to consent to waive the appeal.(1)

11 Waiver of appeal.

An appellant may prosecute his appeal by a new solicitor, without any order of substitution. Papers in the appeal cause need not then be served upon the solicitor below.(2)

12 Solicitor on appeal.

If the appeal is from a decree directing the payment of money, and security has been given by the appellant, so as to stay the proceedings of the respondent, he will be entitled to interest upon the sum decreed by the court below during the time that the proceedings were stayed, by way of damages.(3)

13 Interest.

Maguire, March 21st, 1837. The chancellor after referring to the power conferred by the statute (2 R. S. 178,) to prescribe on what terms the decrees of a vice-chancellor shall be suspended or affected by an appeal, observed—"In pursuance of this authority, the 116th rule adopts the statutory regulations as to the stay of proceedings upon appeals from the chancellor to the court of errors, but with an additional requirement that the appellant can in no case stay the proceedings upon an interlocutory order in any other way than by a special application to the chancellor himself, unless he gets the certificate of probable cause prescribed by that rule. But this certificate will not operate as a stay of proceedings in any case where the appeal itself would not stay the proceedings upon an appeal from such an order of the chancellor, if made to the court of errors. Neither will such certificate deprive the respondent of the right to apply to the vice-chancellor for further security, &c., as a condition of the further stay of proceedings in conformity with the provisions of the 87th section of the statute, (2 R. S. 607.) He then refers to the rule laid down in *Hart* v. *The Mayor, &c., of Albany*, 3 Paige, 381, and says, "The effect of an appeal after the proper steps have been taken to render it a stay of proceedings upon the order appealed from, is to leave the proceedings in the same situation as they were at the time of perfecting such appeal; but not as they were before the order appealed from was entered. If the order was one granting an injunction, the same is not dissolved by an appeal, although the present or immediate power of the court below to punish the party for a breach of the injunction pending the appeal would probably be suspended until after the appeal was disposed of. (2 R. S. 607, § 89.) And where the appeal is from an order dissolving an injunction, such injunction is wholly inoperative."

(1) *Vail* v. *Remsen*. In Chancery, Aug. 7th 1838.

(2) *McLaren* v. *Charrier*, 5 Paige, 530.

(3) *Van Valkenburgh* v. *Fuller*, 6 Paige, 10.

SECTION III.

APPEALS FROM SURROGATES.

1 What orders are appealable.

Appeals to the court of chancery may be made from the orders, decrees and sentences of surrogates in all cases, except where provision has been made for appeals to circuit judges, and except appeals from orders concerning any admeasurement of dower.(1)

The cases of appeals to a circuit judge are specified in the 90th section of the act.

2 Rule as to practice.

The court is authorised to prescribe by rule the course of practice on appeals from the decisions of surrogates.(2) By the 118th rule, it is provided that the proceedings on such appeals shall be conducted by solicitors and counsel, and by guardians *ad litem* of minors, according to the ordinary course of practice of the court in other cases, except as modified by that rule.

3 Time for appealing.

If the decree of the surrogate is for the final settlement of the account of any executor, administrator or guardian, the appeal must be made within three months after such decree shall have been recorded.(3) If the appeal is from an order for the appointment of a guardian, or for his removal, or upon a refusal to make such removal, it must be made within six months after such order shall have been entered.(4)

In all other cases not specified and not otherwise limited by law, appeals shall be made within thirty days after the order, decree or sentence shall have been made.(5)

If the appeal is not entered within the time limited by the statute, the appellate court cannot give relief.(6)

For the form of an appeal, see Appendix, No. 231.

There is a distinction between an account taken between one or more creditors or legatees, and the taking of a final account where all the parties interested in the estate are cited to appear.

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(1) 2 R. S. 609, § 104. (2) Ibid. 611, § 120.
(3) Ibid. 609, § 105. (4) Ibid. § 106.
(5) Ibid. § 107. This language is similar to that of the former act under which the case of *Bay* v. *Van Rensselaer*, 1 Paige, 423, was decided. The thirty days commence when the decree is pronounced.
(6) *Bronson* v. *Ward*, 3 Paige, 189.

In the former case the appeal must be within thirty days. In the latter within three months.(1)

4 Bond.

No appeal shall be effectual until a bond be filed with the surrogate, with two sufficient sureties, to be approved by him, in the penalty of at least one hundred dollars, to the adverse party, conditioned substantially that the appellant will prosecute his appeal to effect, and will pay all costs that shall be adjudged against him by the court of chancery.(2)

5 Petition of appeal.

The appellant must file petition of appeal addressed to this court with the register or assistant register, within fifteen days after the appeal is entered in the court below, or the appeal shall be considered as waived; and any party interested in the proceedings in the court below may apply to the chancellor *ex parte* to dismiss the appeal.(3)

The omission to file the petition of appeal within the fifteen days is not such a waiver as to deprive the court of chancery of all jurisdiction over the case, or to authorize the surrogate to proceed as if no appeal had been entered. But it is such a waiver as entitles this court to declare the appeal deserted, and to authorize the surrogate to proceed. And this court should be applied to for that purpose.(4)

The petition of appeal should briefly state the general nature of the proceedings in the court below and of the sentence, order or decree appealed from, and shall specify the part or parts thereof complained of as erroneous, except where the whole sentence, order or decree is alleged to be erroneous, in which case it shall be sufficient to state that the same and every part thereof is erroneous. And where the appeal is from the sentence or decree of a surrogate on the settlement of the accounts of an executor, administrator or guardian, if the decision is to be reviewed as to the allowance or disallowance of any particular items, such items shall be specified in the petition of appeal; or the allowance or rejection of any such items shall not be considered a sufficient ground for reversing or modifying the sentence or decree.(5)

The petition should name the persons intended to be made defendants in the appeal, and should pray that they may answer the same.(6)

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(1) Ibid. (2) 2 R. S. 610, § 108. (3) Rule 118.
(4) *Halsey* v. *Van Armitage*, 4 Paige, 280.
(5) Rule 118. (6) *Kellet* v. *Rathbun*, 4 Paige, 107.

The petition of appeal may be filed before the transcript directed by the 118th rule is obtained.(1)

See the form, Appendix, No. 232.

6 Transcript.

The appellant must cause a transcript of all the proceedings before the surrogate to be made, authenticated and returned to the court within twenty days from the time of entering the appeal below, or the chancellor may dismiss the appeal, unless further time is allowed for the return of the transcript.(2) The mode of compelling the surrogate to furnish the transcript, or to correct any omissions or imperfections therein is by order and attachment for disobedience, in conformity to the practice of the court in similar cases.(3) See the form of a transcript, Appendix, No. 233.

7 Stay of proceedings.

An appeal when perfected shall stay all proceedings on the order appealed from, until the appeal is determined, or until the court to which the appeal shall be made shall authorize proceedings thereon.(4)

But proceedings are not suspended by an appeal where the order is for the appointment of a collector, or special administrator on the estate of a deceased person; or for the sale of perishable property; or appointing appraisers of personal property; or for the service and publication of notices.(5)

If an order is for the commitment, or awarding process for the commitment, of any executor, administrator or guardian, for not returning an inventory, rendering an account, or obeying any other order of a surrogate, the appeal shall not stay proceedings upon the order or process, unless a bond is given at the time of filing the appeal by the appellant, and two sufficient sureties to be approved by the surrogate, to the people of the state, in a sufficient penalty not exceeding one thousand dollars, conditioned that if the order appealed from shall be affirmed, such person will within twenty days after such affirmance surrender himself to the custody of the sheriff to whom he shall have been committed, in obedience to such order or process.(6)

In like manner if the order of the surrogate is for the commitment of a person refusing to obey a subpœna, or to testify

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(1) *Halsey* v. *Van Armitage*, 4 Paige, 279. (2) Rule 118.
(3) *Halsey* v. *Van Armitage*, 4 Paige, 280.
(4) 2 R. S., 610, § 109. (5) Ibid. § 110.
(6) Ibid. § 111–112.

when required, according to law, a similar bond must be given, or the execution of the order shall not be stayed.(1)

For the form of a bond in these cases, see Appendix, No. 234.

As to the mode of enforcing this bond, see the statute, sections 113, 114, 115.

An appeal from an order suspending or removing an executor, administrator or guardian, does not affect the same till reversed.(2)

8 Appearance.

The respondent should employ a solicitor to appear for him in this court. His proctor below usually acts as such, and gives the ordinary notice of appearance to the register and opposite party.

It is provided by statute, that the filing of an appeal in the office of the surrogate, and perfecting the same by giving a bond in those cases in which it is required, shall be deemed sufficient notice of appeal to the adverse party without any other notice.(3)

9 Order to serve copy petition.

If a copy of the petition of appeal is not served upon the respondent, he may have an order of course that the appellant deliver a copy to the solicitor or the guardian *ad litem* of the respondent within ten days after service of a notice of such order, or that the appeal be dismissed; and if the same is not so delivered, the respondent upon due notice to the adverse party may apply to the chancellor to dismiss the appeal with costs.(4)

10 Order to answer.

After the petition of appeal, and the transcript of the proceedings in the court below have been filed with the register or assistant register, the appellant may have an order of course, that the respondents answer the same within twenty days after service of a copy of the petition of appeal and notice of the order, or that the appellant be heard *ex parte*.(5) See Appendix, No. 235.

If the respondent is an adult, the petition and notice must be served upon his solicitor if he has employed one. If he has not appeared by a solicitor, then the service may be upon the surrogate.(6)

And service upon one who appeared before the sur-

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(1) Ibid. (2) 2 R. S., 611. § 116. (3) Ibid. § 117.
(4) Rule 118. (5) Rule 116. (6) Rule 118.

rogate for the respondent, if a solicitor of this court, is good.(1)

Upon filing an affidavit of the service of the petition and notice upon the solicitor, or upon the surrogate, and that no answer to the petition of appeal has been received, the appellant may have an order of course that the appeal be heard *ex parte*, as against such respondent.(2)

11 Minor respondents.

If the respondent is a minor, and does not procure a guardian *ad litem* upon the appeal to be appointed within twenty days after the filing of the petition of appeal, the appellant may apply to the chancellor *ex parte* for the appointment of such guardian. If the minor has appeared by a guardian in this court, the appellant may have an order of course, that the guardian *ad litem* answer the petition of appeal within twenty days after service of a copy thereof and notice of the order, or that an attachment issue against such guardian.(3)

12 Dismissal by one not made a party.

A party to the proceedings before the surrogate, whose interests are affected by the appeal, and who is not made a party to the petition, may apply to dismiss the appeal so far as it affects his rights, or stays the proceedings before the surrogate to his injury.(4)

13 Entitling papers.

After the petition is filed the proceedings in this court must be entitled in the appeal cause, as between the appellant and those who are made respondents by the prayer of the petition of appeal.(5)

14 Answer.

See the form of an answer to the petition of appeal, Appendix, No. 236.

In matters of account, where the appellant objects to the allowance or rejection of particular items, the respondent may in his answer also specify any items in the account as to which he supposes the sentence or decree is erroneous as against him.

Upon the hearing, the sentence or decree may be modified as to any such items, in the same manner as if an ordinary appeal had been brought.(6)

A cross appeal may in several cases be requisite. The rules would be similar to those upon cross appeals to the court of errors. Ante, p. 43.

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(1) Ibid. (2) Ibid. (3) Ibid.
(4) *Gardner* v. *Gardner*, 5 Paige, 170. (5) Ibid.
(6) Rule 116.

An appeal from the decision of a surrogate on a summary application is not to be placed upon the calendar, but is heard as a special motion.(1)

15 Hearing and papers upon.

Upon the hearing of an appeal the appellant must furnish the chancellor with a copy of the petition, and of the answer, if one has been received, and a copy of the surrogate's return of the proceedings in the court below, including a copy of the appeal as entered in that court.(2)

The appeal has place upon the calendar from the time the matter arose before the surrogate.(3)

16 Decree upon the appeal.

Where the case admits of a final decision, and a remittitur is not necessary for further proceedings, the decree may be enrolled in this court, and execution had thereupon according to the ordinary practice.(4)

Upon a reversal, or modification of the decree, the proceedings may be remitted, with instructions to the surrogate to enter a final decree upon the principles settled by the court,(5) or to take such further proceedings as may be necessary.(6)

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(1) *Wood* v. *Wood*, in Chancery, 20th November, 1833.

(2) Rule 118. *Halsey* v. *Van Amringe*, 6 Paige, 14.

(3) Rule 91.

(4) *Kellet* v. *Rathbun*, 4 Paige, 110.

(5) *Halsey* v. *Van Amringe*, 6 Paige, 19.

(6) *Gardner* v. *Gardner*, in Chancery, March 6, 1838. A decree or sentence had been pronounced upon the report of auditors. The chancellor upon appeal varied the report as to certain items; and the order was, that the sentence or decree of the surrogate be opened and modified accordingly; that the said sentence or decree be in all things confirmed except as above mentioned, without costs to either party on the appeal, and that the proceedings be remitted to the said surrogate, to carry into effect the said sentence or decree, as directed to be modified.

CHAPTER 25.

COSTS.

SECTION I.

WHEN ALLOWED OR REFUSED.

1
General rules.

It is the general doctrine of the court that costs are entirely in its discretion, to be awarded or withheld according to the justice of each particular case.(1) Still as a general rule, the party who fails pays the costs, and must show circumstances to displace this liability.(2) If the question is one of law, and the party has the *dicta* of several judges in his favor, the court will not charge him with costs.(3)

If costs are decreed to be paid by defendants generally, each defendant may be called upon to pay the whole, and the court will enforce contribution among them.(4)

Under the Revised Statutes, the costs of all suits and proceedings in equity, whether originally commenced in this court, or brought here by appeal, may be directed to be paid. An application to rectify certain irregularities in the sale of real estate, under the order of the surrogate, was held to be within this provision.(5)

2
Where another proceeding would suffice.

If a bill is filed, when the relief could be had upon petition, the complainant will not be allowed costs, unless the permission of the court has been obtained.(6)

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(1) *Bennett College* v. *Carey*, 3 Br. C. C. 390.

(2) *White* v. *Folgambe*, 11 Vesey, 337. *Vancouver* v. *Bliss*, 11 Vesey, 468.

(3) *Perry* v. *Whitehead*, 6 Vesey, 54. Anon. 3 Atk. 234.

(4) 2 Fowler's Exch. Pr. 355, and case cited *Jones* v. *Cawhorne*.

(5) *Ex parte Hemiup*, 3 Paige, 305.

(6) *De La Vergne* v. *Evertson*, 3 Paige, 181.

Where there was no pretence of equity against a defendant at the filing of the bill, either for discovery or relief, the defendant should demur. If he answer, he shall be entitled to such costs as he would have received upon a demurrer, and no more.(1)

3 Formal parties.

Where it is necessary to bring parties before the court, who are merely formal, if there is no fault on their part, they will be allowed their costs as against the complainants who may have a decree over against such of the defendants as have rendered the litigation necessary.(2)

4 Executors trustees.

In general an executor or administrator who brings a suit in this court in good faith, on a probable ground of right, will not be charged with costs. But if the bill is brought to aid a defence at law, and fails, he will be liable to costs as he would be at law.(3)

If executors are bound to appear, and have no interest in the question, they will be allowed their costs out of the fund, and the prevailing party will recover those costs also against the other.(4) An executor is the legal representative of the rights of residuary legatees; and if a bill is brought by a creditor or legatee, and there is a fair question for litigation, and he does no more than his duty in attending to their interests, he is allowed his costs out of the fund belonging to them.(5)

Where a testator has expressed himself so ambiguously as to make it necessary to obtain the direction of the court, the costs of the litigation must be borne by the estate. And the general residue is the primary fund for the payment of such costs.(6)

Generally, a party suing in *autre droit*, is not responsible for costs.(7) But wherever a trustee or executor has been guilty of negligence, or his conduct is improper, he will be charged with costs.(8) And if he insist upon the direction of the court

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(1) *Murray* v. *Graham*, 6 Paige, 624.

(2) *American Insurance Co.* v. *Coster*, 3 Paige, 335, and particularly *Stafford* v. *Mott*, Ibid. 102; *Petch* v. *Dalton*, 8 Price, 9.

(3) *Manny* v. *Phillips*, 1 Paige, 472.

(4) *Delafield* v. *Colden*, 1 Paige, 143.

(5) *Pritchard* v. *Hicks*, 1 Paige, 273.

(6) *Smith* v. *Smith*, 4 Paige, 272; *Rogers* v. *Ross*, 4 Johns. C. R. 608; *Ripley* v. *Moysey*, 1 Keene's Rep. 578.

(7) *Goodrich* v. *Pendleton*, 3 Johns. C. R. 520.

(8) *Gray* v. *Thompson*, 1 Johns. C. R. 82; *Black* v. *Blakely*, 2

in a case which does not admit of doubt he will be refused his costs.(1)

If a *cestui que trust* file a bill, he should apply to the trustee to join him as plaintiff, indemnifying him against costs. If the trustee refuses, he will be subjected to his own costs as a defendant. If he is not applied to, the plaintiff must pay his costs.(2)

Where an heir or other person becomes a trustee by operation of law, and resists the claim of the *cestuis que trust* upon a technical ground in opposition to clear testimony, he will not be allowed costs.(3)

5 Infant plaintiff.

As to security for costs by the next friend of an infant, see Vol. I, p. 59.

A *prochein amy* may move when the infant comes of age, that he pay him the costs expended in prosecuting the suit.(4)

If a suit is lawfully instituted for the benefit of the infant, and he elects to abandon it on coming of age, he must pay the costs of his next friend as well as of the adverse party.(5)

But if the suit is improperly brought, he may apply to dismiss the bill without paying the costs of the next friend, but subjecting him to the costs of the adverse party. And the court will direct a reference to inquire into the propriety of the suit.(6)

If the suit is ended before the infant comes of age, and is unsuccessful, the next friend will be charged with costs, unless there is a fund under the control of the court, belonging to the infant, and the suit appears to have been instituted in good faith, for the benefit of the infant.(7)

But in general, the costs of an unsuccessful suit on behalf of an infant must be paid by the next friend.(8)

6 Guardian *ad litem.*

Nothing but the taxable costs of a guardian *ad litem* can be allowed out of the fund which belongs to others. If any extra allowance is to be made, it must come out of the infant's

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McCord's Ch. Rep. 9; *Tieman* v. *Wilson*, 6 Johns. C. R. 411. See *Travers* v. *Townsend*, I Molloy, 96.

(1) *Knight* v. *Martin*, 1 Russ. & Mylne, 70.

(2) *Reade* v. *Sparks*, 1 Molloy's Rep. 8.

(3) *Anstice* v. *Brown*, 6 Paige, 453.

(4) *Brown* v. *Jones*, Exchr. 2 Fowler, 376.

(5) *Waring* v. *Crane*, 2 Paige, 79. (6) Ibid. (7) Ibid.

(8) *Stephenson* v. *Stephenson*, 3 Hay, 123; Matter of *Wheeler*, 2 Molloy, 251.

share.(1) It must be a very special case to justify the court in allowing extra counsel fees against an infant in any case.(2) See ante, Vol. I, p. 63.

7 Married women.

Where a bill is filed by a husband and wife in relation to her property, and he dies before decree, she may proceed or not in the suit at her election. And if she refuses to proceed, she is not liable for costs.(3)

Where a married woman has separate property under the control of the court, it may be made liable to the costs of a suit instituted by her respecting it.(4) See ante, Vol. I, p. 71.

8 Costs in pauper cases.

Although a party admitted to prosecute, as a poor person cannot be charged with the general costs of the cause in favor of the adverse party, he may be charged with interlocutory costs for any irregularity in the proceedings on his part, or for the expense of expunging scandalous or impertinent matter from any pleading or proceedng, or for the costs of his contempts.(5) And if a pauper amends his bill after a perfect answer has been put in, under the common order to amend on payment of costs, he must pay full costs of the further answer. To avoid this he must make a special application to amend without paying costs.(6)

Where a plea was overruled, and the complainant prosecuted in *forma pauperis*, the question of costs upon the plea was reserved to the hearing. They will not be allowed, if the defendant succeed in the defence.(7)

An appeal cannot be prosecuted in *forma pauperis*, and as the appellant must give security for costs, he will be entitled to *dives* costs if he succeed.(8)

A plaintiff who sues in *forma pauperis* for a legacy, and recovers it against executors, if there is no unreasonable delay on their part, ought not to recover full costs, but only the actual expenses of the suit.(9)

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(1) *Union Insurance Company* v. *Van Rensselaer*, 4 Paige, 87.
(2) Ibid.
(3) *Dewall* v. *Couenhoven*, 5 Paige, 581.
(4) *Barlee* v. *Barlee*, 1 Sim. & St., 106.
(5) *Richardson* v. *Richardson*, 5 Paige, 58; *Murphy* v. *Oldis*, 2 Molloy, 475.
(6) *Richardson* v. *Richardson*, 5 Paige, 58.
(7) *Bolton* v. *Gardner*, 3 Paige, 279. (8) Ibid.
(9) *Williams* v. *Wilkins*, 3 Johns. Ch. Rep. 65.

Where the suit was caused by the negligence or poverty of the complainant, and the court decreed relief, by which the means of paying costs were obtained, the court directed payment of dives costs.(1)

It has been the subject of many inconsistent decisions as to the costs which a pauper shall have, if he succeeds in his suit or defence.(2) Chancellor Kent says, that the result is, the court has a discretion in each case.(3)

A pauper in contempt is in the same situation as any other suitor in contempt. He can only be discharged upon the payment of *dives* costs.(4)

9 Habitual drunkards.

If the committee of a drunkard has been guilty of gross neglect, he will be charged with costs of an application for his removal and the settlement of his accounts.(5)

10 Set off.

No set off will be allowed on motion, except where the demand claimed to be set off against the judgment or decree of the opposite party was judicially determined, or settled by the order, judgment or decree of some court of competent jurisdiction.(6)

A decree or judgment arising upon a matter distinct from that in litigation, cannot be set off to the prejudice of the solicitor's lien.(7)

But if different claims arise in the course of the same suit, or in relation to the same matter, they may be set off without regard to the lien of the solicitor. That lien is only upon the clear balance due to his client after all the equities between the parties have been settled.(8)

If the solicitor is obliged to resort to a suit in the name of his client, the adverse party may avail himself of any proper subject of set off which existed previous to the time of the solicitor's lien. But a demand acquired after that time cannot be off set, either at law, or by an application to the equitable powers of a court on motion.(9)

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(1) *McDonough* v. *O'Flaherty*, 1 Beatty, 54.
(2) *Rattray* v. *George*, 16 Vesey, 332.
(3) *Williams* v. *Wilkins*, *ut supra*. See Beames on Costs, p. 121.
(4) *Murphy* v. *Oldis*, 2 Molloy, 475.
(5) In the matter of *Carter*, 3 Paige, 153.
(6) *Dunkin* v. *Vandenbergh*, 1 Paige, 624.
(7) Ibid. (8) Ibid. (9) Ibid.

Where a solicitor is entitled to costs against a party who has a judgment against the solicitor, the debt may be set off against such costs.(1)

The assignee of the costs takes his claim subject to all the equity as to a set off, which existed against the solicitor at the time of the assignment.(2)

11 Solicitor.

Costs arising from the irregularity of a solicitor, either through negligence or ignorance, ought to be charged to the solicitor himself. If the client is compelled to pay them, he may recover them in an action on the case.(3)

A solicitor who neglects to attend to the rights of his client upon the hearing of the cause, is not entitled to costs on such hearing, although he has a decree for his general costs in the cause.(4)

A solicitor who draws a scandalous or impertinent pleading or proceeding, and the counsel who sanctions it with his name, are both personally liable to the adverse party for the costs of expunging the scandalous or impertinent matter. And as a general rule, such costs should be charged upon them in the first instance, although the client is also liable for them.(5)

A counsel may be compelled to pay such costs, although his client is in custody for non-payment of them, and he has not received a fee in the cause.(6)

12 Dismissal of bill.

As to the payment of costs upon a dismissal of a bill voluntary or otherwise, see ante, Vol. I. p. 327–331. It is a general rule, that if a bill has been dismissed, and a new one filed, proceedings will be stayed until the costs of the dismissal are paid.(7) But if the party permits the complainant to proceed to a decree, he will be considered as waiving the claim.(8)

13 In mortgage cases.

If there are junior incumbrancers parties to a bill of foreclosure, and they are compelled to answer to protect their rights, the bill cannot be dismissed upon the plaintiff receiving

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(1) *Utica Insurance Company* v. *Powers*, 3 Paige, 366.
(2) Ibid. (3) *Kane* v. *Van Vranken*, 5 Paige, 64.
(4) *Mitchell* v. *Blair*, 5 Paige, 588.
(5) *Powell* v. *Kane*, 5 Paige, 267; *Somers* v. *Torrey*, Ibid. 54.
(6) *Cushman* v. *Brown*, July 18, 1837; MSS. Ch. Walworth.
(7) *Pickett* v. *Loggon*, 5 Vesey, 702.
(8) *Onge* v. *Truelock*, 1 Beatty's Rep. 341.

payment without paying their costs. Otherwise if their rights are truly stated in the bill.(1)

The decision in question was before the rules of 1830, and no doubt would be applicable to junior incumbrancers coming in and answering, where the bill states merely, as at present, that they claim a right in the premises.

Where a claim is made before a master for the surplus money arising from a sale of mortgaged premises, and the claim is litigated in good faith to establish it, the party will not be subjected to costs, but cannot claim costs. If, however, after the facts are all known, he brings the case to a hearing upon the report, he will be charged with the costs of such hearing.(2)

Upon a redemption bill, costs are usually allowed to the defendant. But if an application is made to redeem before filing the bill, and is refused without cause, or an unconscientious defence is set up, the mortgagee may not only lose costs, but may be compelled to pay them.(3)

Where a mortgage was given more than twenty years previous to foreclosure, and judgment creditors, having no knowledge of its being unpaid, contested it, although the proofs were sufficient to rebut the presumption from lapse of time, the defendants were not subjected to costs. Had they knowingly set up an unjust defence, it would have been otherwise.(4)

If two bills are filed to foreclose two separate mortgages upon the same property, the court will make such a disposition of them as that the property shall not be charged with the costs of both suits.

Where the same solicitor filed both bills, and a decree under either might dispose of the whole proceeds according to the equitable rights of the parties, the solicitor was called upon to elect in which suit he would take his decree.(5)

Although generally a party seeking redemption pays costs, even if he succeed, yet if the defendant improperly resist his

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(1) *Merchant's Insurance Co.* v. *Marvin*, 1 Paige, 557.

(2) *Norton* v. *Whiting*, 1 Paige, 579. See rule 136.

(3) *Brockway* v. *Wells*, 1 Paige, 619; *Slee* v. *Manhattan Co.* Ibid. 48.

(4) *Park* v. *Peck*, 1 Paige, 478. And see *Bank of Plattsburgh* v. *Platt*, Ibid. 465.

(5) *Wendell* v. *Wendell*, 3 Paige, 509.

claim he not only may not be given costs, but may sometimes be charged with them.(1)

A mortgagee who comes to redeem is not bound to pay the costs of a statute foreclosure. The purchaser under such foreclosure is only entitled to the amount due on the mortgage under which he purchased.(2)

14 Bill for dower.

If a widow apply for an assignment of dower before filing her bill, or an equivalent, and the request is refused, costs of the suit will be given her, but not if she file her bill without such application.(3) In the case cited, the widow claimed dower to a much greater extent than was decreed. The defendant was obliged to resist this claim, and each party was decreed to bear his own costs.

15 Upon plea or demurrer.

See ante, Vol. I. p. 215 and 223, as to the provisions of our rules for costs upon allowing or overruling a plea or demurrer.

If a plea is ordered to stand for an answer with liberty to except, the plaintiff is entitled to his costs, as if it had been overruled.(4)

A party demurring *ore tenus* must pay the costs of the demurrer on record.(5)

If a plea is ordered to stand over to the hearing, and saving the defendant the benefit thereof at that time, neither party has costs against the other, unless specially directed by the court.(6)

16 Exceptions.

Where exceptions were taken to an answer, some were allowed, and some disallowed by the master. The complainant submitted and the defendant excepted. On hearing before the court, the report was confirmed. The costs of the hearing of the exceptions to the report were given to the complainant, as also the costs of the reference, and of the exceptions allowed by the master. But the defendant was not given costs for the exceptions disallowed by the master. He should have submitted to answer those which were well taken.(7)

I have stated the above decision for the better understanding of the 63d rule of 1837.

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(1) *Vroom* v. *Ditmas*, 4 Paige, 525.
(2) *Ibid. and Benedict* v. *Gilman*, 4 Paige's Rep. 58.
(3) *Russel* v. *Austin*, 1 Paige, 192.
(4) *Howling* v. *Butler*, 2 Mad. Rep. 245.
(5) *Garlick* v. *Strong*, 3 Paige, 440.
(6) *Heartt* v. *Corning*, 3 Paige, 572.
(7) *Richards* v. *Barlow*, 1 Paige, 138. And see S. C. Ibid. 323, (1828.)

By the former rule, no part of the costs of the reference were allowed unless the *major* part of all the exceptions referred were finally allowed. By the present rule, to obtain costs of the reference, all of the referred exceptions must be allowed, or disallowed finally.

The present regulations of the court are these. The complainant is entitled to the costs of the exceptions which are submitted to, and of those which are finally allowed after a reference; that is the costs of drawing, serving, &c.

Neither party can get costs of the reference unless he succeeds finally as to all the exceptions referred.

The costs of the hearing before the court are in its discretion; but neither party can have costs against the other, unless he succeed in the *major* part of the exceptions to the report. If he succeed in a *major* part, but not in all, his costs shall not be taxed over ten dollars.(1)

If some exceptions are only allowed in part, neither party is entitled to the costs of such exceptions.(2)

It was decided before the last revision of the rules, (1837,) that where impertinent matter which could have been comprised in one exception, was set forth in several, the costs of the reference might be refused, although the exceptant succeeded in the *major* part of his exceptions.(3) Perhaps the same rule would now be adopted if the exceptant succeeded in all.

17 Cause standing over.

If a cause is directed to stand over for want of parties, a defendant having for the first time made the objection at the hearing, each party having equal knowledge of the facts, the rule seems to be to make each party bear his own share of the unnecessary expense, not to allow the defendant costs. But if the order to stand over is silent as to costs, and a decree for costs generally has been made against a defendant, the costs of the supplemental bill and the proceedings will be included.(4) If the objection is taken in the answer, and the cause is proceeded with, costs will be allowed.

18 Appeal.

If a party has given notice of an appeal from the order of a

(1) Compare Rules 62 and 63.

(2) *Richards* v. *Barlow*, 1 Paige, 325.

(3) *Franklin* v. *Keeler*, 4 Paige, 382.

(4) *Rogers* v. *Rogers*, 2 Paige, 467; *Mitchell* v. *Barley*, 3 Mad. Rep. 62 and n.

vice-chancellor, and notices the appeal for hearing, when in reality, no appeal has been entered, the chancellor has jurisdiction to charge him with the costs of the adverse party for appearing to oppose.(1) See as to costs in court of errors, ante, p. 56.

If a defendant has no interest in a question which is brought before the court on an appeal, he is neither entitled to nor can he be charged with costs.(2)

Where two defendants united in an appeal and failed substantially as to the whole, they where both charged with the costs of the appeal, although one of them procured a modification in his favor of one part of the decree.(3)

If the party appealing succeed only as to part of the items objected to on the appeal, neither party will be allowed costs. But he will be allowed for necessary expenses incurred to repel presumptions arising from the counter affidavits which are deceptive.(4)

An appeal will not lie with respect to the allowance or refusal of costs where the matter is wholly discretionary with the court below. But it will lie where costs are disposed of as matter of relief, or where they are given or refused contrary to statute, or the settled practice of the court.(5)

So if a party appeals upon a substantial ground, the appellate court may vary the decree as to costs, though the appellant fail upon the merits.(6)

An appeal from a decree as to the general costs in a cause is authorized by statute. But an opinion has been expressed in the court of errors by Justice Cowen, that the clause in question has not extended the right beyond what it was before. It is a mere limitation of the time. *Rogers* v. *Holly*, 18 Wendell, 352.(7)

It must be entered within fifteen days after notice of the decree.(8)

In *Stafford* v. *Mott*, 3 Paige, 102, a debtor to a judgment debtor was made a party to a bill to recover the amount; which

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(1) *Mechanics' Bank* v. *Snowden*, 2 Paige, 299.
(2) *Bulkley* v. *Van Wyck*, 5 Paige, 536.
(3) *Atlantic Insurance Co.* v. *Storrow*, 5 Paige, 285.
(4) *The People* v. *Elmer*, 3 Paige, 87.
(5) *Winslow* v. *Collins*, 3 Paige, 89.
(6) Ibid. (7) 2 R. S. 605, § 79. (8) Ibid.

he was willing to pay deducting his just demands by way of set off. On appeal, the decree was varied by allowing him his costs, which had been refused below.

If an appellant succeed only in part upon an appeal, neither party will be allowed costs.(1)

If a solicitor refuses to waive a technical advantage upon reasonable terms offered, and compels the party to come to this court for relief, he will not be allowed costs for opposing the application.(2)

Where there was a joint appeal by several defendants, and the decree was reversed as to the part which related to one, and affirmed as to the others, no costs were given to either party on the appeal.(3)

19 Bill of discovery.

As a general rule, a defendant who has fully answered a bill of discovery is entitled to costs. If the complainant apply before filing the bill for the information or an admission of the facts, he will be exempted from the payment. He should state such application in his bill.(4)

If the facts charged in a bill of discovery are denied, the plaintiff must pay costs of course, as there is no way of contesting the truth of the answer. The cause is never brought to a hearing. But after the time for excepting has expired, the defendant is entitled to move for costs.(5)

There are cases in England in which a bill for discovery is also for a commission to examine witnesses abroad in aid of an action. In such cases, the costs of the discovery are not given until the commission is returned.(6) But such a bill would not be permitted here, as courts of law have the power of issuing commissions.

The costs to which a defendant is entitled upon a bill of discovery not only apply to putting in the answer but to all expenses of resisting motions. Thus in *Noble* v. *Garland*, 1 Mad. R. 344, considerable expenses had been incurred on several motions which had been resisted, namely a motion to stay trial, a motion for a commission for the examination of witnesses

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(1) *Stafford* v. *Mott*, 3 Paige, 102.
(2) *Gaul* v. *Miller*, 3 Paige, 195.
(3) *Fulton Bank* v. *N. Y. and Sharon Co.*, 4 Paige, 139.
(4) *King* v. *Clark*, 3 Paige, 77. (5) Ibid.
(6) *Anon.*, 8 Vesey, 80; *Bunbury* v. ——, 9 Vesey, 103.

abroad, and a motion that defendant's might bring into court all books mentioned in the defendant's answer. These were allowed.

If the bill contain a prayer for general relief, the defendant must bring the cause to a hearing in the usual manner to get his costs. He cannot move for them in the usual mode.(1)

The question of costs is disposed of upon such a bill by motion. The cause is not to be brought to a hearing. Fees therefore are only chargeable as upon an ordinary special motion.(2)

Although a complainant who files a bill of discovery becomes insolvent or bankrupt, yet still the defendant is entitled to his order for payment of his costs. It does not defeat his rights, and it may be a question between the insolvent and his assignees whether the estate should not pay the costs.(3)

If a woman file a bill of discovery while she is single, and afterwards marries, the defendant loses his costs; for the suit abates, and there can be no revivor for costs. If execution was taken out for them it must be in her maiden name, and there is no such person; and the husband could not be liable being no party to the suit.(4)

Upon a bill against several praying relief as to some, and a discovery only as to one, the latter cannot have his costs upon the usual motion. The court will not examine the record to see whether the complainant might not under the prayer of general relief be entitled to some relief against this defendant.(5)

If a complainant should be allowed on motion to convert a bill of discovery into a bill for relief, he must pay the costs of the suit up to the time of such allowance, including the costs of the application.(6) See the order for costs, Appendix, No. 237.

If an officer of a corporation is made a party for the purpose of discovery only, and the plaintiff is compelled to pay his costs, he may have a decree over against the corporation for them.(7)

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(1) *McDougall* v. *Miln*, 2 Paige, 325.

(2) *Boughton* v. *Phillips*, 6 Paige, 434.

(3) *Hibberson* v. *Fielding*, 2 Sim. & St. 371.

(4) *Dodson* v. *Judd*, 10 Vesey, 31. See Beames on Costs, p. 34.

(5) *Attorney General* v. *Barch*, 4 Mad. Rep. 178.

(6) *Lousada* v. *Templer*, 2 Russell, 531; *Wilkinson* v. *The Master of Christ College*, 2 Fowler's Exch. Pr. 350.

(7) *Fulton Bank* v. *N. Y. and Sharon Co.*, 4 Paige, 127.

20 Bill of interpleader.

Whenever a bill of interpleader is properly filed, in good faith by the complainant, he will be entitled to his costs.(1)

A bill to redeem a mortgage in the nature of a bill of interpleader may be filed, but in such a case costs are not a matter of right, but in the discretion of the court. Where, therefore, a complainant in such a bill was in possession of the premises, and could not be dispossessed by an action at law, and one party claiming the money had offered indemnity, he was not allowed his costs.(2)

If such a bill is rightfully and neccessarily filed, the complainant is entitled to his costs out of the fund, which is the subject of the suit; and he is not obliged to take his chance of getting them from the defendant against whose claim the court eventually decides.(3)

If one of the defendants allows the bill to be taken as confessed by him, he will be personally chargeable with all the costs produced by his unjust claim on the fund.(4)

21 Costs upon motions.

If a party opposes a motion successfully, and nothing is said in the order as to costs, he will have them, if he get a decree for costs generally in the cause.(5)

So if a party succeed in a motion, and obtain an order for costs, and no direction is given as to them, and he obtain a general decree for costs, he shall be allowed the costs of the motion.(6) But this rule does not apply if the motion is granted as a mere matter of favor, or to relieve the applicant from the consequences of his own default.(7)

The party who opposes a motion without success, is not entitled to the costs as costs in the cause.(8) Nor is the party who makes the motion and fails.(9)

In all cases of special motions or petitions, if the affidavits or other papers, on which the application is founded, or those which are read in opposition are unnecessarily prolix or voluminous, the solicitor will be refused the costs to which other-

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(1) *Aymer* v. *Gault*, 2 Paige, 285.
(2) *Bedell* v. *Hoffman*, 2 Paige, 200.
(3) *Badeau* v. *Rogers*, 2 Paige, 210. (4) Ibid.
(5) *Rogers* v. *Rogers*, 2 Paige, 459; *Wilkinson* v. *Henshaw*, 4 Paige, 257.
(6) *Stafford* v. *Bryan*, 2 Paige, 45, and see 1 Sim. & St. 357.
(7) Ibid. (8) Ibid. (9) Ibid.

wise he would have been entitled as against the adverse party, if such useless or improper papers had not been produced by him.(1)

22 Judgment creditors bill.

The complainant is not entitled to counsel fees out of a fund which belongs to a judgment debtor or his creditors; as between party and party, the counsel for the complainant has in no case a right to be paid extra counsel fees out of a fund belonging to a defendant, except where the counsel has been employed to obtain or create such fund for the joint benefit of parties.(2)

23 Divorce cases.

See title Divorce, ch. 32, § iv. sub. 2.

24 Apportionment of deficient fund.

Where the debt to the complainant and the costs of both parties are directed to be paid out of a particular fund, which is insufficient to pay the whole, the amounts must be paid rateably, unless there is something in the decree to show a preference of one claim over the others.(3)

25 Evidence witnesses.

Where a plaintiff has examined an unnecessary multitude of witnesses, and taken a large body of irrelevant testimony, he must pay the costs of the depositions, although the bill was dismissed without costs as to the rest of the cause, there being some fair ground for filing it.(4)

Wherever depositions are suppressed, or objectionable testimony expunged, pursuant to the provisions of the 85th Rule, the party at whose instance the evidence was taken, shall not be allowed costs on taxation as against any of the other parties in the cause, either for the fees of the examiner or commissioner, or for any copies of any part of the deposition of that witness, unless the court in the order suppressing the deposition shall otherwise direct.(5)

Where the court has not decided upon the validity of the objection to the testimony, if it has been taken down in opposition to the decision of the examiner or commissioner, no allowance shall be made on taxation, for any part of the depositions or copies thereof, unless the taxing officer shall be satisfied that the decision of the examiner or commissioner was wrong, or

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(1) *Seeber* v. *Hess*, 5 Paige, 86.
(2) *Ryckman* v. *Parkins*, 5 Paige, 545.
(3) *Burrall* v. *Leslie*, 6 Paige, 445.
(4) *Moore* v. *McKay*, 1 Beatty, 282.
(5) Rule 85.

the court upon a special application, or at the hearing shall have otherwise directed.(1)

If depositions are irrelevant, or unnecessarily prolix, the solicitor, at whose request the irrelevant matter is taken down, is answerable for the examiner's fees; but he is not allowed therefor on the taxation of costs even against his own client.(2)

Where a commission for the examination of witnesses may be obtained under the 69th Rule by application to the register or clerk, and the party applies to the court, he will not be allowed the extra costs of such motion.(3)

26 Severing in defence.

Where the same solicitor appears for different defendants, or different solicitors who are partners appear for several defendants, and separate answers are put in, or other proceedings had by or for the defendants separately, the taxing officer, in the taxation of costs either as between party and party, or between solicitor and client, shall consider whether such separate answers or other separate proceedings were necessary or proper; and if in his opinion any part of the costs occasioned thereby was unnecessarily or improperly incurred, the same shall be disallowed.(4)

SECTION II.

TAXATION AND RE-TAXATION.

1 Officers to tax.

One master residing in each circuit is designated and appointed by the chancellor as the taxing master of such circuit. He is authorized to tax costs when the vice-chancellor of such circuit resides more than twenty miles from the clerk's office, or is absent from his usual place of residence.(5) In all other cases the costs are to be taxed by a vice-chancellor.(6) A vice-chancellor may tax the costs in a suit or proceeding before any other vice-chancellor as well as before the chancellor.(7)

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(1) Ibid. (2) *Stafford* v. *Bryan*, 2 Paige's Rep. 45.
(3) *Clark* v. *Bundy*, 6 Paige, 432. (4) Rule 130.
(5) Rule 129. (6) Ibid.
(7) *Chapman* v. *Munson*, 3 Paige, 347.

2
Re-taxation.

An application to the chancellor for re-taxation of costs is not an appeal which must be made within fifteen days. A vice-chancellor in taxing costs is not considered as holding a court in his character of judge but only as a ministerial officer.(1)

Where costs have been taxed by a vice-chancellor, upon hearing of the parties, the application for a re-taxation may be made directly to the chancellor, whether the suit was pending before a vice-chancellor or not.(2)

This provision is confined to cases where the amount of the costs is in controversy. But if the proceedings of the adverse party have been irregular, the application for a re-taxation, or to set aside the proceedings for irregularity, must be made to the vice-chancellor before whom the suit is pending.(3)

If a party who applies for a re-taxation of costs succeeds as to part only of the items objected to, neither party shall be allowed the costs of the re-taxation.(4)

The mode of reviewing the taxation of costs is by a petition or motion specifying the items which are supposed to be erroneously taxed. The English practice of a petition for leave to except does not prevail.(5)

3
Notice of taxation.

Notice of taxation should be served the same time previous to the day as is required for service of a summons in ordinary cases. There must be therefore not less than two days' notice if the adverse solicitor resides in the same city and town where the taxation is to take place, and four days if he resides elsewhere within fifty miles, and two days in addition for every fifty miles from his residence to the place of taxation.(6)

It is not the practice of the taxing officers to require any proof of service of a copy of the costs or notice before they proceed to taxation.

4
Items to be specified.

The several items of disbursements and the fees of the officers of the court must be particularly specified in the bill of costs and not charged in gross, or they shall be disallowed on taxation. When witnesses fees are charged, the names of the witnesses shall be specified, and the number of days' travel and attendance of each.(7)

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(1) *Loyd* v. *Brewster*, 5 Paige, 88.
(2) Rule 129.
(3) *Chapman* v. *Munson*, ante.
(4) *Loyd* v. *Brewster*, 5 Paige, 88.
(5) *Hoffman* v. *Skinner*, 5 Paige, 526.
(6) Ibid.
(7) Rule 130.

5
Affidavit to bill of costs.

An affidavit of the solicitor, or of the officer who prosecutes or defends in person, must be annexed to the bill of costs, stating, according to the best of his knowledge and belief, that the several disbursements charged in the bill have been necessarily and actually paid or incurred; that the copies and exemplifications of documents charged therein were actually and necessarily used or obtained for use; that such bill contains no charge for any draft, engrossment, or copy of any pleading or other proceeding which has not been made, or for any other service which has not been performed except such prospective services as are allowed by law or the practice of the court to be taxed; and that the number of the folios contained in the draft, or in the copies of any pleading or proceeding are not overcharged in such bill.(1)

The affidavit may be made by the clerk or law partner of the solicitor, or officer, provided a sufficient excuse is stated in the affidavit for not producing the affidavit of such solicitor or officer, by reason of sickness, death, or necessary absence.(2)

6
Filing bill of affidavit.

The taxed bill, with the original affidavit annexed, must be filed with the register, assistant register, or clerk, within twenty days after the taxation, and before the solicitor or the officer who prosecutes or defends in person shall be entitled to payment, or to issue an execution or other process for the collection of his costs.(3)

No register, clerk, or master, who is ordered to pay costs out of money in his hand, shall pay the same until the taxed bill of costs and affidavit are duly filed.(4)

7
Certificate of register, &c.

The assistant register or clerk, gives a certificate of the taxed bill and affidavit being filed, which is delivered to the master as his authority to pay. Appendix, No. 238.

If payment of the costs is voluntarily made within the twenty days, the solicitor or officer, instead of filing the taxed bill and affidavit (except where the bill of costs is required by law to be annexed to the enrolment) may deliver such bill and affidavit to the party or person from whom he receives such payment, endorsing a receipt for the amount upon the taxed bill,(5)

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(1) Rule 130. (2) Ibid. (3) Rule 131. (4) Ibid.
(5) Rule 131.

SECTION III.

WHAT ITEMS ARE TAXABLE.

It has been considered most useful to give a selection of bills of costs in an appendix, in which the various decisions and rules of the court will be referred to upon the particular items.

SECTION IV.

PROCESS FOR COSTS.

1 For interlocutory costs.

By the 171st Rule, if a party is ordered to pay the costs of interlocutory proceedings, and no time of payment is specified in the order, he shall pay them within twenty days after the filing of the taxed bill and affidavit, and service of a copy of the order and of such taxed bill; or if a gross sum is specified in the order within twenty days after service of a certified copy of the order.

After such service has been made, and the time has elapsed, an affidavit should be made of the personal service of the copies of the taxed bill, and of the order, (or in case of a sum in gross being specified in the order) of the order only, and of a demand for payment, and that such costs have not been paid.(1) Appendix, No. 239.

Upon filing this affidavit an *ex parte* order may be obtained to commit such delinquent to prison.(2)

The court must be applied to for this order. It is not of course. See Appendix, No. 240.

2 For costs upon final decree and appeal.

The statute provides that performance of any decree, or obedience thereto, may be enforced by execution against the body or against the goods and chattels, lands and tenements of the party against whom the decree is made.(3)

Under this provision the chancellor says, it may be doubtful whether a *fi. fa.* can be issued upon a mere order for the payment of interlocutory costs.(4)

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(1) Rule 171. (2) Ibid. (3) 2 R. S. 183.
(4) *Van Ness* v. *Cantine*, 4 Paige, 56.

But upon an appeal from a vice-chancellor to the chancellor upon an interlocutory order, the court may make a decree respecting the costs on the appeal which will authorize the party to enrol the same, and to take out execution against the person or the property of the party against whom the party costs are adjudged.(1)

And such is the practice of the court of chancery on an appeal to the court of errors from an interlocutory order of the chancellor. The decree of the appellate court is a final decree, so far as respects the costs awarded on the appeal.(2) It is in the power of the party, however, to whom costs are awarded, upon such an appeal to the chancellor to resort to an execution, or to the precept for commitment under the 171st Rule.(3)

In the case of *Gregory* v. *Dodge*, an appeal was taken from an order of a vice chancellor to the chancellor, and from his decision to the court of errors. It was a purely interlocutory matter. (See 14 Wendell, 593.) The decree of the court of errors affirmed that of the chancellor, and directed the costs of the respondent taxed at $243 45, to be paid: upon filing the remittitur, an order was entered, which, see Appendix, No. 241.

It will be noticed that the cause was not remitted to the vice-chancellor.

The complainants (appellants above) were non-residents, and the appeal bond had been signed by residents of the city of New-York. The solicitor having had his costs taxed, and applied to the sureties for payment which was not made, got his decree enrolled, and issued execution, which was returned *nulla bona*. Upon such return, and an affidavit of the non-residence of the appellants, an order was applied for on notice to the sureties, that the appeal bond be put in suit.

In the case of the *New-York Chemical Company* v. *Flowers*, October, 1837, the chancellor stated that before an appeal bond could be put in suit against the sureties, the remedy must be exhausted against the principal. An execution or process must be issued.

For the forms of executors, see the precedents in the Book of Rules.

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(1) *Brockway* v. *Copp*, 2 Paige, 578. (2) Ibid. (3) Ibid.

CHAPTER 26.

EXECUTION OF DECREE, SATISFACTION, DISCHARGE OF DOCKET.

SECTION I.

EXECUTION.

1 General rules.

THE court may enforce performance of any decree, or obedience thereto, by execution against the body of the party against whom such decree shall have been made, or by execution against the goods and chattels, and in default thereof, the lands and tenements of such party. No process can issue, however, upon a final decree until the same shall have been enrolled.(1) The former statute of 1813 and that of 1862, gave similar power to the court.(2) By these provisions the tedious process of the English court is done away with. That was ordinarily a writ of execution of the decree served upon the party, and followed up by all the process of contempt to a sequestration. The sequestration was rendered effectual as to personal estate by a sale and payment of the proceeds to the party, and as to real estate, by payment of the rents.(3)

No process can issue to enforce a decree until it has been enrolled.

In practice our decrees vary much in one particular. Often and especially in old decrees, the sum of money adjudged due is to be paid, or the duty is to be performed within a time specified in the decree. In other cases, it is decreed to be paid

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(1) 2 R. S. 183, § 110.
(2) Laws 1813, 2d Vol. 487. Webster's edit. Laws, Vol. 3, p.
(3) See Seaton on Decrees, p. 400, et seq.

without fixing a time, and in each case a clause is inserted that the party have execution to enforce the decree.

By our practice whether the time is fixed or not, an execution may be taken out at once, as soon as the decree is enrolled, in like manner as it is issued upon a judgment when docketted at law. This course is well settled in practice, though the English rule is different.(1)

2 Against the person.

The form of a writ of execution in the nature of a *ca. sa.* is set forth in the precedents annexed to the rules. (No. 4.)

Under this writ the party is entitled to the gaol liberties, and may be discharged upon presenting a petition and making an assignment of his property under the insolvent act.(2)

Where an attachment issues for non-payment of costs, the party is also entitled to the gaol liberties, but not to a discharge under the act, upon surrender of his property. If the commitment is for a fine imposed for a contempt, he must be closely imprisoned, and cannot be discharged.(3)

No execution can issue against the body or property of the party except upon a decree of the court, or upon some positive order in the nature of a decree. Where a party is equitably entitled to costs, he should apply to the court for a positive order for the payment thereof, before he take out an execution.(4)

3 Against personal and real property.

The *fi. fa.* against personal property includes a direction that if the debt cannot be made out of the goods and chattels, the sheriff shall raise the amount out of the lands and tenements of the party. See Appendix to Rules, No. 5.

The Revised Statutes have authorized the court to enforce the performance of a *decree only* by an execution against the property of the party as on a common law judgment. It is therefore doubtful whether a *fi. fa.* can be issued upon a mere order for the payment of interlocutory costs.(5)

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(1) *Parkins* v. *Morrice*, Dickens, 689. Mr. Dickens stated to the court, that where by a decree it was provided that a defendant should pay, &c., and the master had reported the amount, the plaintiff should apply for a short order stating that part of the decree, an application for payment and refusal, and praying an order, &c., and that the court may, as it frequently does, fix a time, when by the decree, it is indefinite. *Collins* v. *Crumpe*, 3 Mad. Rep. 390; and Seaton on Decrees, p. 28, and *Munston* v. *Singleton*, there cited.

(2) *The People* v. *Bennett*, 4 Paige, 283. (3) Ibid.

(4) *Van Ness* v. *Cantine*, 4 Paige, 56.

(5) *Van Ness* v. *Cantine*, 4 Paige, 57.

But upon an appeal from an interlocutory order of a vice-chancellor, the chancellor may make a decree respecting the costs on such an appeal which will authorize the party to enrol the same, and to take out execution against the person, or the property of the party against whom such costs are adjudged.(1)

So upon an appeal to the court of errors, if that court awards costs on appeals from interlocutory orders of the chancellor, the decree is in such cases final, so far as respects the costs awarded on the appeal; and these costs may be collected on an execution in the usual manner.(2)

See further upon this subject, ante, title Costs, chap. 25. § iv.

Until an actual levy no goods or chattels shall be bound by an execution as against a purchaser without notice. By the Laws of 1813, (1 R. S. 487, § 4,) this provision extended to lands as well as goods.

Every final decree made since the passage of the Revised Statutes, directing the payment of any debt, damages, costs or sum of money, shall bind and be a charge upon the lands, tenements, real estate and chattels real, of every person against whom such decree shall be rendered, which such person may have at the time of the docket thereof, or shall acquire at any time thereafter.(3)

Such decree shall cease to be a lien, or bind any such property, against purchasers in good faith, and against incumbrancers subsequent to such decree by mortgage, judgment, decree or otherwise, from and after ten years from the time of filing such decree.(4)

From the language of the different sections of the statute, it seems that nothing but a decree finally ascertaining and directing payment of a liquidated sum will bind lands. Compare sections 100, 101 and 102. A decree for an account, and to pay the sum found due upon such accounting, would not be a lien, even if it can be enrolled.

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(1) *Brockway* v. *Copp*, 2 Paige, 578.
(2) Ibid.
(3) 2 R. S., 182, § 102.
(4) 2 R. S., 182, § 103.

SECTION II.

DISCHARGE.

A decree is discharged by a written acknowledgment by the party in whose favor the decree was rendered, that he has been fully paid and satisfied the amount of all money directed to be paid by such decree.(1) See the form, Appendix, No. 241.

This must be certified by a vice-chancellor, or master in chancery, to have been duly acknowledged before him by the party signing the same, and that such party was known or made known to him by competent proof.(2)

Upon filing with the register, assistant register or clerk with whom the decree was docketted, this acknowledgment, he shall enter in the docket of such decree, a satisfaction and discharge thereof. Such decree shall thereupon be discharged.(3)

The court may also order the docket of a decree to be discharged upon a hearing of the parties, and upon satisfactory evidence that it has been fully paid.(4)

The register, &c., is to transmit to the clerks of the supreme court, a certificate of the discharge, who shall thereupon enter in the transcript of the docket of such decree the fact that the same is discharged, reversed or vacated.(5)

SECTION III.

EXECUTION OF A DECREE RELATING TO SPECIFIC REAL ESTATE.

Conveyances decreed to be executed.

Where the decree directs deeds or other instruments to be executed by a party to the suit, the ordinary process of contempt must be employed to enforce their execution.(6) There are, however, special cases under our system, in which an officer of the

(1) 2 R. S., 182, § 104. (2) Ibid. (3) Ibid.
(4) Ibid. 105. (5) 2 R. S., 182, § 106.
(6) *Ormsby* v. *Nicholson*, Vernon & Scriv. 115; 1 Turner & Venables, 227.

court has been empowered by statute, to execute conveyances which before must have been executed by the parties.(1) And in England, by a late statute, 1 William IV., c. 36,(2) a provision has been adopted, that wherever a decree has been made for the execution of deeds by a party, and he neglects or refuses to execute them, and is in prison on process for his contempt, the court may appoint one of the master's to execute the same.

A more extensive provision is contained in a statute of New-Jersey, by which a decree for the execution of any conveyance shall be deemed equivalent at law and in equity to the conveyance itself.

But in our state, except in the cases provided for by statute, I conceive that no legal title or estate can be conveyed by a deed of any master or other officer, however an equitable title may be acquired under the decree, which the court would enforce by delivering possession, and protect by a perpetual injunction. Still much embarrassment may arise to a purchaser without an estate at law, and generally he is not bound to accept a mere equitable title.(3)

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(1) Partition and Mortgage Cases, see post.

(2) Sugden's Acts, by Jemmet, p. 106.

(3) It has been necessary to pass a statute to empower masters to execute a conveyance upon mortgage sales. The history of this proceeding in our court is this:—In 1760, an act was passed, authorizing decrees against absent or concealed mortgagors after giving the notice prescribed by the act, and that upon such decree a writ might be issued to the sheriff commanding him to make sale of the lands at public vendue. Van Schaack's edit. Laws, Vol. I. p. 386. *Carpenter* v. *Guest*, 7th June, 1786; *Thompson* v. *Mere*, 24th January, 1787.

By an act of 1769, this law was continued to 1780. Ibid. Vol. II. 497. A similar act was passed 7th March, 1785, 1 Jones & Varick, 190. But a previous appraisement of the property was required. This was abolished by the law of 13th March, 1787, 2 Jones & Varick, 112.

In other cases, however, than those in which the mortgagor was absent or concealed, the decree was for a sale under the direction of a master, and all proper parties to join in the same and in the conveyance. *Wilkins* v. *Rivington*, 7th March, 1799. If there was an infant, he had his day to show cause in the usual form. *Samler* v. *Scott*, 10th January, 1801.

By the act concerning the court of chancery, 3d April, 1801, (Webster's edit., Vol. I. 439,) it was first provided, that all sales of mortgaged premises, to be made under any decree of the court should be made, and deeds executed by the master.

So in partition, by the settled English law, the parties are directed to

The cases in which the decree must necessarily be for the parties to execute conveyances, are those of bills for a specific performance: to set aside a deed and reconvey; and in England, a decree upon a redemption bill, although, from the doctrine of our court as to the legal estate, it might not be necessary here.

Absent defendants.

In the case of a decree against an absent or absconding defendant, it is specially provided, (§ 129,) that upon the coming in of the report, the chancellor shall make such order thereupon as shall be just. And process shall then issue to compel the performance of such decree, either by sequestration of the real and personal estate of the defendant; or where any

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execute conveyances to each other mutually; for although at law the legal estate is vested by a partition, yet in equity only an equitable title passes. *Whaley* v. *Dawson*, 2 Sch. & Lefroy, 372; Anon. Trin. 1742; 3 Swanst. 139; n. *Trickfield* v. *Butler*, from a MSS. of Sir George Hampson; Seaton's Forms of Decrees, 195.

A sale under a bill for partition is unknown in England, and was permitted by statute in our state upon the report of commissioners of the situation of the premises, (1 R. L., 1813, 508, 510,) and they were authorized to execute conveyances.

In the year 1818, in the case of *Tabele* v. *Taylor*, the inquiry whether the premises in question were incapable of a division without great prejudice to the owners was for the first time referred to a master, the court being satisfied that such preliminary inquiry might be conducted before him as well as by commissioners. This practice was afterwards frequently adopted in New-York. It was then also suggested whether the court could not employ a master to sell and convey. The opinion of counsel was, that it had no power to do so; that it could not by any possibility transfer the legal estate through a master. In the year 1826, a statute was passed, the same as that contained in the Revised Statutes, authorizing sales and conveyances by a master.

The case of *Mason* v. *Codwise* arose in the year 1821. It was a creditor's bill against executors, who had a power of sale, and the personal estate was insufficient. On the 22d November, 1821, an order was made for the sale of the property, with the usual directions as to notice, &c., and the decree proceeded: "And it is further ordered, that the said master, *together with the said executors*, execute deeds of conveyance to the several purchasers of the land so to be sold."

The clause italicized was not in the order as drafted. I suggested the difficulty as to the master's power to convey, to the counsel and to Chancellor Kent. I well remember his quick manner of demanding, "Why! cannot I order my masters to execute any thing, and wont it be binding?" He became soon satisfied that he could not endue them with the power of giving a legal estate vested in others.

specific estate or effects are demanded by the bill, by causing possession of the property so demanded to be delivered to the complainant.(1)

I consider that this provision would not (in a creditor's bill for example) supersede a decree of sale, with a direction for all parties to join, which could be enforced when the absent defendant came within the jurisdiction. But the difficulty as to the legal estate still occurs. Ante, p. 95, and note.

For the proceedings upon a sequestration, see Vol., I., 145. The writ in this case may be applied for at once, the fact of absence, &c., doing away of course the necessity of any process against the person. But there should be a motion or petition to the court, stating the fact of absence for the sequestration to issue.

Under the statute respecting suits against heirs, devisees, &c. (2 R. S. 454,) every final decree rendered in a suit by a creditor against an heir or devisee shall have preference as a lien on the real estate descended, to any judgment, or decree obtained against such heir personally, for any debt or demand in his own right.(2.) And a sale under an execution upon such decree will overreach all alienations of the estate made subsequent to the commencement of the suit.(3)

In the case of *Morris* v. *Mowatt*, 2 Paige, 592, the chancellor thought it probable that in order to give the purchaser a legal title, sufficient to protect him in a court of law from a sale under a previous judgment against an heir, it might be necessary to issue an execution upon the decree, and have the property sold by the sheriff in the usual manner.

Under the same statute, where the bill is against several heirs or devisees jointly, the amount of the recovery is to be apportioned among the several heirs, &c., as well as the costs, and only such proportion is to be recovered of each heir. The decree must express the amount thus apportioned, and the execution must conform to the decree.(4)

If such a decree is rendered against infants, no execution shall be executed against them until the expiration of one year

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(1) 2 R. S., 187, § 130.
(2) 2 R. S., 454, § 48.
(3) Ibid. § 49; 2 Paige, 592.
(4) 2 R. S., 455, § 52, 53.

after the rendition of the decree; but such execution may be executed against any co-defendants of full age.(1)

The solicitor must endorse upon the execution the names of the infant defendants, and shall direct the sheriff not to execute the same against them, until the expiration of the time specified.(2)

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(1) 2 R. S., 455, § 54. (2) Ibid. § 55.

CHAPTER 27.

BILL OF INTERPLEADER.

1. Nature and object of bill, and where it lies.

A BILL to interplead, is a bill in which the complainant claims no right in opposition to the rights claimed by those against whom it is exhibited, but prays the decree of the court touching the rights of those persons for his own safety. It is where two persons claim of a third the same debt or the same duty.(1)

It may be filed, though the party has not been sued at law, or has been sued by one only of the claimants, or though the claim of one is actionable at law, and of the other in equity.(2)

The object of such a bill is to protect a complainant standing in the situation of a stakeholder, not knowing to whom to pay the money, or to deliver the property in his hands; and where a recovery against him by one party might not be a protection against the claim of another.(3)

But a bill of interpleader should not be filed where the holder of the fund is party to a suit in this court, brought by one claimant against the other, to settle the right of the fund. He should petition the court for liberty to pay it in.(4)

A bill of interpleader is strictly a bill in which the complainant claims no relief against either of the defendants, but only asks for liberty to pay the money or deliver the property to the one to whom of right it belongs, and that he may thereafter be protected against the claims of each.(5) The only de-

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(1) Mitford, 32. *Dungey* v. *Angove*, 2 Vesey, jr., 310.
(2) *Richards* v. *Salter*, 6 Johns. C. R., 445.
(3) *Badeau* v. *Rogers*, 2 Paige, 209. (4) Ibid.
(5) *Bedell* v. *Hoffman*, 2 Paige, 200.

cree to which he is entitled is, that the bill was properly filed; that he pay the fund into court, (if not previously brought in,) and that he have his costs.(1)

A bill to redeem a mortgage, where there are conflicting claims to the money, may be filed, and is in the nature of a bill of interpleader. But in such a case costs are not matter of right, but in the discretion of the court.(2) See ante, p. 84, sub. 20.

The filing of bills of interpleader should not be encouraged; and they should never be brought, except in cases where the complainant can in no other way protect himself from an unjust litigation, in which he has no interest.(3)

A party against whom such a double claim is made, so as to entitle him to file a bill of interpleader, is not bound to file it, so long as the course of proceeding taken by the different claimants is such as, if persevered in, will determine their respective rights as between themselves, without the intervention of the court.(4)

If the effect of the injunction upon such a bill will be, not only to prevent the rights of the attaching creditors from being ascertained, but to permit some third party to intervene, and obtain a title against both, the injunction will be modified, so as to permit the parties to proceed to judgment at law.(5)

The case tendered by every bill of interpleader ought to be, that the whole of the rights claimed by the defendants, may be properly determined by litigation between them, and that the plaintiffs are not under any liabilities to either of the defendants beyond those which arise from the title to the property in question. If the plaintiff has come under any personal obligation, independently of the question of property, so that either of the defendants may recover against him at law, without establishing a right to the property, no litigation between the defendants can ascertain their respective rights as against the plaintiff. The injunction, which attends a proper bill of interpleader, would therefore deprive such defendant of a part of his legal

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(1) Ibid. (2) Ibid. (3) Ibid.
(4) *Sieveking* v. *Behrens*, 2 Mylne & Craig, 581.
(5) Ibid. 597.

right without affording him any equivalent. And such a case would not be proper for an interpleader.(1)

If the personal engagement was obtained through misrepresentation, it would afford ground for relief in equity, but not for a bill of interpleader.(2)

2 Principal and agent, landlord and tenant.

It is familiarly said that there is no interpleader between landlord and tenant, or principal and agent; but it will be found that the reason for this lies deeper, than might be inferred from the statement of the rule. It is to be considered not so much an independent rule, as a necessary consequence of the principle of all interpleading. In both these cases rights and liabilities exist between the parties, independent of the title to the property, or to the debt or duty in question, and which may not depend upon the decision of the question of title.(3)

Where, however, the landlord or the principal has given, *subsequently* to the creation of the relation, an interest in the subject matter, to a third person who makes a claim, the bill will lie.(4)

Lord Cottenham, under this position, examines the cases of *Nickolsen* v. *Knowles*,(5) *Cooper* v. *De Tastet*,(6) *Pearson* v. *Cardon*,(7) and *Mason* v. *Hamilton*.(8)

All these cases he shows, support the position that where such a relation exists, no bill will lie if the adverse claim is prior, but only where it is derivative.

See upon the question, as between landlord and tenant, the leading case of *Dungey* v. *Angove*, 2 Vesey, jr., 304.

There may, says Lord Rosslyn, be a variety of cases in which the tenant, not disputing the title of the landlord, but affirming that title, the tenure and the contract by which the rent is payable, but where it is uncertain to whom it is to be paid, may file a bill of interpleader. He instances the cases of mortgagor

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(1) Per Lord Cottenham, *Crawshay* v. *Thornton*, 2 Mylne & Craig, 19.

(2) Ibid.

(3) Per Lord Chancellor, *Crawshay* v. *Thornton*, 2 Mylne & Craig, 20.

(4) Ibid. (5) 5 Mad. Rep. 47. (6) 1 Tamlyn, 177.

(7) 4 Simons' Rep. 218, and on appeal, 2 Russ. & Mylne, 606.

(8) 5 Simons, 19.

and mortgagee, trustee and *cestui que trust*, a married woman with a separate estate, the rent of which has been paid to the husband and notice given to pay to her. See also *Clark* v. *Byrne*, 13 Vesey, 383.

Where a landlord had brought an action on a policy of insurance, and a party with whom he had entered into an agreement to lease the premises, filed a bill to compel the application of the insurance money to the repair of the premises, a bill of interpleader by the company was held proper.(1)

Where an auctioneer had received a deposite on a sale, and gave a receipt expressing that the deposite would under no circumstances be paid over to either buyer or seller without their mutual consent, and the production of the receipt, and a difficulty arose as to the title, and one of the parties sued the auctioneer at law, it was held that a bill of interpleader would lie.(2) The vice-chancellor adverted to a statute passed in England, giving the relief to the party by an application to a judge of the court of law.

If a party is taxed in two different towns for the same property which is only liable to taxation in one, and where it is doubtful to which town the right to tax belongs, he may file a bill of interpleader to settle the right.(3) But if it is apparent from the bill itself, that he was properly taxed in one of the towns, the bill cannot be sustained.(4)

The rule is that the complainant must show he is ignorant of the rights of the defendants, or at least that there is some doubt to which of the claimants the debt or duty belongs; so that he cannot safely pay it to one without the risk of being liable to the other.(5)

If the holder of the property has parted with it, on receiving indemnity from one of the claimants, he cannot sustain a bill of interpleader.(6)

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(1) *Paris* v. *Gilham*, Cooper's Cases, 56.
(2) *Bleecker* v. *Graham*, 2 Edw. Rep. 648.
(3) *Thompson* v. *Ebbetts*, 1 Hopk. 272.
(4) *Mohawk and Hud. R. R. Co.* v. *Clute*, 4 Paige, 385.
(5) Ibid.
(6) *Bennet* v. *Anderson*, 1 Merivale, 405. See 6 Conn. R. 421.

3
Bringing the money into court.

The plaintiff should offer in the bill to bring the money into court.(1) Lord Redesdale says, that in strictness the want of this offer is ground of demurrer. But in *Meux* v. *Bell*, (6 Simons, 175,) it was held that a demurrer would not lie in such a case, although the plaintiff must pay it in before taking any steps in the cause. All difficulty is however avoided, where an injunction issues, as it must in almost every case. By a late case it is settled, that the common order for such an injunction is, that it issue upon the parties paying the money into court. This is a condition precedent, and an order not containing it will be discharged.(2) If the money cannot be paid in in time to stay a trial, the injunction officer should be applied to, to vary the order on the special grounds.(3)

The register and clerk therefore, under our practice, should not issue the injunction until the money is paid in, and the officer should make the provision part of his certificate. The court will, on application of either defendant, order the money or property to be brought in.

4
Affidavit.

An affidavit must also be annexed, made by the plaintiff, that he doth not exhibit the bill by fraud or collusion with either of the parties, but merely for his own indemnity.

But if the bill is sworn to, as is now almost always necessary under our rule of court, the statement should be made in the bill, and no affidavit is requisite.

It was held by Lord Hardwicke, that the plaintiff need not swear the bill is filed at his own expense; the material part of the affidavit being that the plaintiff should swear he did not collude with any of the defendants.(4). Where there is a suspicion of collusion, the court will direct an inquiry into the circumstances.(5) In *Stevenson* v. *Anderson*, 2 Ves. & Bea., 407, Lord Eldon observed, that the form of the affidavit, as stated in Harrison's Practice, seemed going too far, in swearing that the bill was filed without the knowledge of either of the

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(1) *Mohawk and H. Co.* v. *Clute*, 4 Paige, 385; *Thanet* v. *Paterson*, Barnardiston, 247.

(2) *Sieveking* v. *Behrens*, 2 Mylne & Craig, 581.

(3) Ibid.

(4) *Metcalf* v. *Harvey*, 1 Vesey, sen., 248.

(5) *Dungey* v. *Angove*, 4 Vesey, jr., 310.

defendants. Lord Rosslyn inclined to think, that an injunction ought never to issue on an interpleading bill without the money was brought into court; but the practice was ascertained to be, that it may be brought in at any time, and this is done upon the application of either party. But see ante, p. 103.

5 Proceedings upon the bill.

If the bill does not show that each of the defendants claims a right, both defendants may demur; one because the bill shows no claim of right in him, the other because the bill showing no claim of right in the co-defendant, shows no cause of interpleader.(1)

After the plaintiff has brought the defendants to interplead by filing their answers, and put the cause at issue, his office appears to be at an end. Each defendant becomes then in the nature of a plaintiff. The master of the rolls, in *Angell* v. *Hadden*, (16 Vesey, 203,) says, that the court disposes of the questions arising upon bills of interpleader in various modes, according to the nature of the question. An interpleading bill is considered as putting the defendants to contest their respective claims, just as a bill by an executor or trustee to obtain the direction of the court upon the adverse claims. If at the hearing, the question between the defendants is ripe for decision the court decides it, if not ripe, directs an action, or an issue, or a reference to a master, as may be best suited to the nature of the case. The plaintiff does not pray any decree in favor of one defendant against another; but the decree is either prayed by one of the defendants, or is such as the court thinks it right to pronounce. Lord Eldon has observed, that he never knew an instance of a bill of interpleader being brought to a hearing.(2) This arises no doubt from the circumstance that the defendants usually go into proof against each other after replication, and the cause is then brought on upon its merits, not simply to procure a decree of interpleader. See however the cases from Daniels' Reports, cited post.

It appears that the plaintiff should file a replication to the answers, in order to put the cause properly at issue.(3) If after

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(1) Harr. Prac., 97. Philad. edit.

(2) *Martinius* v. *Helworth*, 2 Vesey & Bea., 412. n.

(3) *Duncannon* v. *Campbell*, Dick, 448. See *Hodges* v. *Smith*, 1 Cox's Cases, 357.

answer by both defendants one makes default at the hearing, the court will decree, on hearing the case of the appearing defendant.(1)

In *Duncanan* v. *Campbell*, it was held, that where one of the defendants sued out a commission to examine witnesses, that notice of its execution given to the plaintiff was sufficient without notice to the other defendant. But Mr. Dickens justly observes, that as the plaintiff has nothing more to do than to bring the cause into a state to be heard, and having replied so that the defendants were enabled to examine witnesses with which he had nothing to do, the defendant ought to have had notice.

From these cases and principles, it is clear that after the answers are in, and the cause at issue, either defendant may proceed in the cause to examine his witnesses, &c. And the plaintiff or either defendant may notice it for hearing when prepared. It also appears that it is the practice to give the plaintiff notice of the steps taken in the case, and this is proper, as he has an interest that the decree which is for his protection should be regular and complete.

Where one of the defendants is out of the jurisdiction, or allows the bill to be taken as confessed by him, the plaintiff is entitled to the decree of interpleader, and a reference will be directed if the facts for a decree are not made out by the other defendant.(2)

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(1) *Hodges* v. *Smith*, ante.

(2) *Fairbrother* v. *Prattent & Aitcheson*, Daniel's Rep. 64. Bill by an auctioneer, who had sold an estate and received a deposite which the purchaser claimed to have repaid, and the vendor forbade. One of the defendants appeared and answered, claiming the sum, and the other allowed the bill to be taken *pro confesso* against him. No testimony was taken. Lord Chief Baron said, the only difficulty arose from one of the parties not being before the court; but that did not originate with the plaintiff. If a plaintiff in an interpleading bill be active against one defendant, and neglect to proceed against the other, he is not entitled to the assistance of the court, but no neglect could be imputed here. The other defendant was before the court in point of law, though not in fact. The plaintiff therefore must have his decree. The decree directed payment of the costs of the plaintiff to be paid out of the sum in court; and that the defendants do interplead before the Deputy Remembrancer as to their right to the deposite, who was to report to which it of right belonged. The question of costs as between

After a decree to interplead is obtained, the death of the plaintiff does not produce an abatement.(1) For the form of such a bill, see Appendix, No. 242.

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the two defendants was reserved. In the case of *Fairbrother* v. *Nerot & Harris*, cited in a note to the above case, the decree directed payment of plaintiff's cost, and that the defendant *Nerot* be at liberty to proceed in the action he had commenced against the plaintiff, which defendant *Harris* was to defend, and both to be bound by the verdict to be had; but no execution to be taken out until the cause should be further heard after trial. The defendants, or either of them, to be at liberty to examine the plaintiff as a witness on the trial. Costs as between the defendants were reserved.

(1) Mitford's Pleadings, 57. Anon. 1 Vernon, 351.

CHAPTER 28.

BILLS OF DISCOVERY.

1 Nature of the bill.

THAT which is usually called a bill of discovery is a bill praying a discovery of facts resting in the knowledge of the defendant, or of deeds, &c., in his power, and seeking no relief from the court in consequence of such discovery, although it may pray the stay of proceedings at law till the discovery. It is commonly used in aid of a suit in some other court.(1)

One of the most important rules upon bills of this description, and in which the doctrine of our court varies from that of the English is, that in the latter, if the bill is for discovery and relief, and the plaintiff does not appear entitled to the relief, a general demurrer will be allowed. The plaintiff must shape his bill according to what he has a right to pray.(2)

In the case of *Le Roy* v. *Servis*,(1 Caines' Cases in Error, 1 and 175,) the rule in our state was settled differently. The plaintiff appearing entitled to the discovery could sustain his bill, although he went on to pray relief which could not be granted, and to which a special demurrer would have been good. A general demurrer therefore to the whole bill was held bad, upon the rule that a demurrer bad in part was bad in the whole.

2 Affidavit where paper is called for.

As to cases in which it is requisite to annex an affidavit to the bill of the plaintiff not having the paper in question in his possession, the distinction is this:

"If the bill be brought only for a discovery and delivery up of a deed, and prays no other relief, then it is not necessary that the plaintiff should annex an affidavit that he hath not the deed in his custody; for it cannot be intended a man will bring

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(1) Mitford 42.

(2) *Price* v. *James*, 2 Br. C. C. 319; 3 Vesey, 346, 7; 6 Ibid. 63, 686; 8 Vesey, 3; 2 Vesey, jr., 514.

a bill only for discovering or delivering up of that deed which he himself is possessed of; but if the bill seek relief generally upon any deed or bond, as to recover the money upon the bond, or the profits of land under the deed, in this or the other case, there must be an affidavit annexed to the bill that the deed is not in the plaintiff's custody, because such a bill does by consequence seek to transfer the jurisdiction from the common law to the court of equity."(1)

Since the rule of 1837 requiring all bills (except where an answer on oath is waived) to be sworn to, the allegations should be inserted in the bill, not in a separate affidavit.

Persons claiming under a will are entitled as against an heir at law, to a discovery of deeds relating to an estate and to have them delivered up.(2)

3 Costs payable to the plaintiff.

When a bill is for discovery only, and the plaintiff has a full discovery by the answer, he cannot reply or proceed, and when he has had the benefit of the discovery in an action at law, and comes after to dismiss his bill (which he must do or the defendant will,) such dismission will be with costs to be taxed, which seems hard since the defendant was the occasion of this bill by his false plea below. (3)

But in *Weymouth* v. *Boyer*, 1 Ves. jr., 423, J. Buller, sitting for the Lord Chancellor, said, he was aware that it is the practice of the court, that if a plaintiff comes for a discovery, when he has it he shall pay the costs; but he thought the rule so expressed was too general. And if ever a case arose while he sat there under circumstances which he thought a proper ground for withholding costs, he should put the parties to reconsider the question. By a proper case he meant, if the plaintiff is entitled to the discovery, and goes first to the defendant to ask for the account he has a right to, if the defendant refuses, and the plaintiff is thereby compelled to come here for the discovery, he would not give the defendant costs. But if the plaintiff thought fit to file his bill without trying first to get his discovery in that way in which men acting with each other ought first to ask their rights, he ought to pay costs.(4)

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(1) Per King Ch. 2 P. Wms. 541; *Whitchurch* v. *Golding*. See also 3 Atk. 132, and 1 Caines' Cases in Error 175.

(2) 8 Viner's Ab. 551, pl. 12.

(3) 1 Harr. Pr. 120, ed. 1807. Bunbury, 124.

(4) See to the same effect *Ring* v. *Clark*, 3 Paige, 77.

4
In aid of an action at law.

Where an injunction is obtained against proceeding at law until an answer is obtained to a bill of discovery, it is a matter of course to dissolve the injunction as soon as the answer of the defendant is perfected, whether he admits or denies the facts charged in the bill.(1)

To sustain a bill of discovery, in aid of a defence at law, it is necessary for the complainant to show that the discovery sought is material to his defence in the suit at law; and if this is not shown by the bill, the defendant may demur.(2)

And the complainant must also show affirmatively in the bill, that his right or defence cannot be established at law by the testimony of witnesses, or without the aid of the discovery which he seeks.(3)

The court will not presume that it is material or necessary for the complainant to have a discovery, merely to guard against anticipated perjury in a suit at law.(4)

If a verdict has been obtained at law, it is too late to file a bill of discovery.(5)

The bill should state some particular matter which the complainant has a right to have discovered; that is material to his defence; and that he cannot proceed to trial at law without it. A mere fishing bill to discover the ground of the suit at law, cannot be sustained.(6)

Although the statute authorizing the courts of law to compel a production of books and papers has not abolished the jurisdiction of this court, yet where every thing sought for here can be obtained by an order at law, this court should not interfere. If indeed the bill seeks a disclosure of facts within the personal knowledge of the party, and which cannot be otherwise proved, this court will interfere.(7)

A bill of discovery merely to aid the defence of an action at law is not such a bill concerning property, as to be within the

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(1) Ibid. (2) *Leggett* v. *Postley*, 2 Paige, 601.
(3) Ibid. (4) Ibid.
(5) *Duncan* v. *Lyon*, 3 Johns. Ch. Rep. 355; *Thurmond* v. *Dunham*, 3 Yerger, 99. See as an exception *Field* v. *Beaumont*, 1 Swanston, 209.
(6) *Newkerk* v. *Willett*, 2 Caines' Ca. 296; *Lucas* v. *The Bank of Darien*, 2 Stewart, 280.
(7) *Fitzhugh* v. *Everingham*, 2 Edw. 607.

37th section of the statute as to the jurisdiction of the court, requiring the matter in dispute to exceed the value of $100.(1)

5 Supplemental bill of discovery.

After an original suit is at issue, a complainant may sometimes file a supplemental bill, in the nature of a bill of discovery, for the purpose of obtaining evidence in support of the matters put in issue in the original suit, of which evidence he was not apprized at the time of filing his replication. But that is strictly a bill of discovery in aid of the original suit, and should not pray relief. The complainant obtaining the discovery on such a bill pays the defendant's costs, as in other bills for discovery merely. The bill in such cases is in nature of a supplemental suit for a discovery, rather than of a supplemental bill in the original suit.(2)

6 Form of bill.

See the form of a bill of discovery, Appendix, No. 243.

The prayer for relief should be omitted. If it is inserted in the general form in a bill, in all other respects one of discovery only, the bill in England is demurrable.(3)

The prayer for process should conclude with the words, "to abide the order and *direction* of the court," not, "the order and *decree* of the court." But even if the latter words are used in the prayer for process, it will not make the bill one for relief.(4)

While, a general demurrer would not, under our decisions, lie to a bill clearly proper for discovery only but praying relief, yet a special demurrer to the relief, giving the discovery, may be sustained. The vice-chancellor, in *Angell* v. *Westcombe*, says, in every case it ought to appear most distinctly whether the bill is for relief or discovery only; for if that matter is left in doubt, the defendant may put in his answer, and then the plaintiff may amend his bill by praying specific relief.

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(1) *Schroeppel* v. *Redfield*, 5 Paige, 246; *Golday* v. *Becker*, 1 Edw. 271.

(2) *Dias* v. *Merle*, 4 Paige, 263.

(3) *Allan* v. *Copeland*, 8 Price, 522; *Ambury* v. *Jones*, 1 Younge's Rep., 199; *Angell* v. *Westcombe*, 6 Simons, 30. In the last case, however, liberty was given to amend, by striking out the prayer for general relief. But perhaps under our decisions, a demurrer would not lie, except where the amount is under $100. See *Schroeppel* v. *Redfield*, 5 Paige, 248.

(4) *Schroeppel* v. *Redfield*, 5 Paige, 248.

The general opinion of the profession was against the decision, in *Branden* v. *Sands*, 2 Vesey, jr., 514.

7 Bill not brought to a hearing.

A bill of discovery is not brought to a hearing, either upon bill and answer, or upon pleadings and proofs; but after the expiration of the time for excepting, and the answer has become perfect, the defendant makes a special motion for his costs.(1)

But it is held that where the bill is for relief against several defendants, and for discovery only against one, he may not make the motion for his costs, but must wait till the hearing. The court will not take the labor of ascertaining whether, under the prayer for general relief, some relief may not be given against him.(2) See further as to costs, ante, p. 82, sub. 19.

8 Amendment to make it a bill of relief.

There is a class of cases as to the right to convert a mere bill of discovery into one for relief by amendment. It appears to be the rule, that this will not be allowed, except where the answer has furnished grounds for supposing that the relief is in equity, and not at law. See the cases cited in *Ware* on Discovery, p. 23.

And it has been held that a motion is not proper to strike out the prayer for relief, and convert the bill into one for discovery only. It should be dismissed, and a new bill filed.(3)

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(1) *Ring* v. *Clark*, 3 Paige, 76.

(2) *Attorney General* v. *Birch*, 4 Mad. Rep., 178.

(3) Ware on Discovery, p. 24, and cases. But see *Angell* v. *Westcombe*, ante, note 3.

CHAPTER 29.

BILL BY A JUDGMENT CREDITOR.

1 General observations.

BILLS by judgment creditors have become since the passage of the Revised Statutes, of great importance, and embrace a large proportion of the business of the court. It is true that before those statutes the language of the judges and senators, especially of Justice Woodworth in the case of *Hadden* v. *Spader*, (20 Johns. Reports 554,) carried the doctrine as far as the statutory provisions; and it has been repeatedly stated by the present chancellor, that these provisions are declaratory only of the law as settled by the court of errors in the case of *Hadden* v. *Spader*.(1) However, chancellor Sandford having in the year 1823 decided the case of *Donovan* v. *Finn*, (1 Hopkins,) greatly restricting the positions taken in the former case, and limiting the power of the court to a much narrower sphere, bills of this character were not numerous until the passage of the act referred to, in 1830.

It may be worth while to observe that these bills differ in several particulars from what are generally known as creditors' bills. The latter are perhaps exclusively confined to the administration of the estate of a deceased person, or conveyances to trustees for the benefit of creditors; they are filed on behalf of the plaintiff and all others standing in a similar relation who may come in under such bill and the decree to be made; they may be filed by simple contract creditors, and do not require a judgment to have been obtained. In these particulars they differ from those now considered.(2)

The actual result of the decision of chancellor Sandford, be-

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(1) *Cassidy* v. *Meacham*, 3 Paige, 312, and other cases.

(2) *Pearson* v. *Bowne*, in Chancery, 1838.

fore noticed has been, that a system of principles and practice upon this subject almost new has grown up. Numerous careful decisions have been made and regulations adopted by the present chancellor; and I believe I may state it as the general opinion of the profession, that the system is admirably framed; that it is as efficient in practice as it is right and sound in principle. The statutory provisions are these:

2 Provisions of statutes.

Whenever an execution against the property of a defendant, shall have been issued on a judgment at law, and shall have been returned unsatisfied in whole or in part, the party suing out such execution may file a bill in chancery against such defendant and any other person to compel the discovery of any property, or thing in action, belonging to the defendant, and of any property, money or thing in action, due to him or held in trust for him, and to prevent the transfer of any such property, money or thing in action, or the payment or delivery thereof, to the defendant, except where such trust has been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself.(1)

The court shall have power to compel such discovery and to prevent such transfer, payment or delivery, and to decree satisfaction of the sum remaining due on such judgment out of any personal property or things in action belonging to the defendant, or held in trust for him, with the exception above stated, which shall be discovered by the proceedings in chancery, whether the same were originally liable to be taken on execution or not.(2)

3 As to personal estate.

It will be observed that while in the 41st section language is used comprehensive enough to reach real estate, the power of the court to decree payment of the judgment debt is restricted by the 42d section to payment out of *personal* property discovered.

4 Discovery of real estate.

Still the construction of the statute is, that such a bill is one for a discovery in aid of the execution at law, as well as for relief against property which cannot be sold on execution. Hence the complainant is entitled to a discovery of all the real estate which the defendant owned within the jurisdiction of the court of law, at the time of docketing the judgment, although it had been sold fairly since.(3) In such case an exe-

(1) 2 R. S. § 41. (2) Ibid. § 42.
(3) *Le Roy* v. *Rogers*, 3 Paige, 234.

cution could issue under the sanction of the court, notwithstanding the filing of the bill.

So far this court would seem to act as the auxiliary of the court of law; and having discovered the property, leave the collection of the debt to be made by legal process. But the court also held, that the complainant was entitled to a discovery of all the estate or property which the defendant had at the filing of the bill or putting in the answer, within or without the state; as he might have execution hereafter from this court, if within, and if without, might be compelled by an order of the court to transfer it by a proper conveyance to a receiver, to be sold and applied to the payment of the demand.(1)

And the rules declared in the cases cited under the next subdivision, will show the jurisdiction of the court as exercised, either under the statute, or under its original power not limited by the statute.

5 Priority of bills; and relief according to the nature of the property.

The creditor who files the first bill, obtains a priority as to the equitable interests of the debtor, although his judgment may be junior to the judgment of others, who subsequently file bills.(2)

This lien is acquired by filing the bill, not from the time of the return of the execution. But if the judgment creditor is compelled to come into this court in consequence of a trust being created, and that trust is held void, or if an assignment is void and set aside, and the property is real estate, the oldest judgment will have the preference.(3)

The priority is indisputably given as to property which cannot be levied upon by an execution at law, that is as to equitable interests. The filing of the bill operates as an attachment upon such property.(4)

It seems also to attach to personal property which in its nature may be levied upon, but has not been discovered upon the execution, and only by the bill. The statute provides that the court may decree satisfaction of the sum due out of any personal property, &c., discovered by the proceedings, *whether the same were originally liable to be taken in execution or not.*

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(1) *Le Roy* v. *Rogers*, 3 Paige, 234.
(2) *Corning* v. *White*, 2 Paige, 567; *Burrall* v. *Leslie*, 6 Paige, 446.
(3) *Wakeman* v. *Grover*, 4 Paige, 42.
(4) *Corning* v. *White*, 2 Paige, 568.

No assignment can give a right to the property except for the surplus not necessary to pay the debt.(1)

The lien is only acquired upon property belonging to the defendant at the time of filing the bill, or its proceeds. The complainant may file a supplemental bill to reach after acquired property. A bill filed in the interim by another judgment creditor would have a priority as to such property.(2)

With respect to the relief which the court ultimately grants, the following appear to be the rules.

As to personal estate, when the debt is admitted or decreed, the funds are usually in the hands of a receiver, and payment may be ordered out of them, or when they come to his hands. He collects the debts, or sells them, converts the property obtained, and through his medium usually satisfaction is had.

In relation to real estate—if the property in question is of an equitable character, the court will decree a sale of it under the direction of a master, and all proper parties to join in the conveyance, or transfer. See the decree in *Edmeston* v. *Lyle*, 1 Paige's Rep., 643. Or a transfer or assignment having been made to a receiver under the usual order, he is competent to c onvey and transfer it when directed by the court.(3)

So if the real estate lies in another country, this court will compel a conveyance or transfer to a receiver, and direct a sale by him when found proper.(4)

I may observe, that the right to lands in another state or country, must necessarily be of an equitable character, even where the title would be clearly legal if they were situated in this state. They cannot be bound by the judgment. Hence the proceeds of such lands must necessarily be applied in satisfaction of the first creditor who files his bill.

If the real estate is within this state, and of a legal nature so that a judgment at law binds it, and an execution can be issued, this court will reach it by authorizing an execution to be issued from the court of law.(5) This will be necessary where a conveyance has been made of the property bound by

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(1) *Eager* v. *Price*, 2 Paige, 337. (2) Ibid.

(3 *Le Roy* v. *Rogers*, 3 Paige, 236. In *Clark* v. *Hone*, 1837, the defendant transferred specifically to the receiver certain contracts for lands in Florida, which were afterwards ordered to be sold.

(4) *Le Roy* v. *Rogers*, 3 Paige, 236. (5) Ibid.

the judgment, between such judgment and decree. But as to real estate vested in the defendant at the date both of the judgment and decree, (a decree being obtained for payment of the amount,) it is within the power of the court to issue an execution and have the property sold.(1) This sale must, I suppose, be subject to all previous judgments.

These rules are applicable to property of either description, derived from the debtor himself. Where it comes from another, under a trust created by another, other provisions of the statutes are applicable.

6 Issuing and return of execution.

The foundation of the jurisdiction under the statute is, that an execution on the judgment has been issued, and returned unsatisfied.(2) The complainant must state in his bill the time when it was returnable, as well as the sheriff's return. Hence it is decided, that the bill cannot be filed until after the return day of the execution, although it has been actually returned before that time. Until the return day, it would be the duty of the sheriff, to seize and sell any property of the defendant found within his bailiwick.(3)

The chancellor, in the case of *Cassidy* v. *Meacham*, says, that it would probably be a valid defence to a bill of this kind to show, that the complainant had colluded with the sheriff to prevent a levy upon the defendant's property; or that he had issued his execution into a remote county, when he was aware of the fact that the defendant had sufficient property in the county where he resided or carried on his business, to satisfy the judgment; and which county was also within the jurisdiction of the court of law. In ordinary cases of a judgment in the supreme court, it seems sufficient to set out in the bill the issuing of the execution, the time, when issued, and when returnable, and that it was returned unsatisfied. The defendant may then show by plea or answer, that the complainant has not in good faith exhausted his remedy, by showing not only that he resided, or had a place of business in some other county, but also that he had visible property there, out of which the execution might have been satisfied

(1) Ibid, and 2 R. S., 183, § 110.
(2) 2 R. S., 173, § 41.
(3) *Cassidy* v. *Meacham*, 3 Paige, 311.

if the complainant had exercised due diligence to ascertain the fact.(1)

In the case of *Parker* v. *Moore*, August, 1838, the vice-chancellor of the first circuit held, that where it plainly appeared by the statements in the bill itself, that the defendants had goods, while the execution was in the sheriff's hands, in a store in their custody, which appeared upon the just construction of the allegations to belong to them, a receiver should not be appointed.(2)

Where a creditor filed his original bill upon the return of an execution on one judgment, and afterwards obtained another judgment, upon which he also issued execution, and then filed a supplemental bill before the return of the last execution, the last bill was held bad on demurrer.(3)

In the case of *Leggett* v. *Hopkins*, in chancery, March 20, 1838, (MS. of Chancellor Walworth,) the complainant obtained a judgment in the common pleas of the city of New-York, and sued out execution there, which was returned unsatisfied. The defendants resided in the western part of the state, where they had abundant property to pay the debt. The bill was then filed. On the motion to dissolve the injunction issued upon the bill, the chancellor decided that after a judgment recovered in a court of record, and execution duly returned, the complainant might proceed in this court without bringing another suit in the county where the defendants had property or resided, or in the supreme court. That it was the duty of the defendants to have paid the debt without suit, having ample property for that purpose; that the complainant had done all which was necessary to comply with the requisitions of the statute; and that the bill was properly filed.

If the judgment creditor has issued his execution to the proper county, and the same has been returned unsatisfied, he does not lose his right to file a bill to reach equitable interests, by suing out a new execution to reach property which he sup-

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(1) *Cassidy* v. *Meacham*, *ut supra*.

(2) An opinion has been given by counsel, conformable to the principle of these decisions, that where an execution had been returned upwards of three years before the bill was filed, a demurrer would lie. I do not know of a decision in point.

(3) *McElwain* v. *Willis*, 3 Paige, 506. Affirmed by court of errors, Dec., 1832.

poses has been subsequently acquired. He need not wait until the new execution is returned unsatisfied.(1)

If, however, the last execution is actually levied upon property of the defendant sufficient to satisfy the judgment, to which property there is no adverse claims, and which ought to be applied to the payment of the debt, the suit here will be barred. But otherwise if the property is insufficient.(2)

After the return of one execution unsatisfied, the plaintiff may take out another against property liable to execution, but fraudulently transferred or incumbered for the purpose of protecting it from the execution, and he may then file his bill for the double purpose of removing this obstruction to his execution, and also to reach other property which cannot be sold on such second execution.(3)

Another principle of importance may be drawn from the case of *Cuyler* v. *Moreland*. The judgment debtor had with his tenant in common sold a farm to the defendant Fosmire, after the docket of the judgment. There were prior incumbrances by mortgage upon it. The judgment debtor and his co-tenant received certain notes of persons who were made defendants, and a bond and mortgage of the purchaser Fosmire, in payment of the balance of the purchase money beyond the former mortgages. The chancellor held, that even if the farm was worth more than sufficient to satisfy the liens thereon for the purchase money, &c., which were entitled to a preference, yet the equitable interests and choses in action of Moreland, the judgment debtor, must be first applied instead of resorting to a sale of the farm in the hands of a *bona fide* purchaser.

The spirit of the statute is that the plaintiff shall have made a *bona fide* attempt to collect his debt by execution against the property of the defendant. If he is not aware of any tangible property of the defendant he may issue the execution to the county in which the defendant resides, or where he was residing at the commencement of the original suit against him.

But where the judgment is in the supreme court, and the defendant has a fixed and known place of residence at the time the execution is issued, and visible property where he resides

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(1) *Cuyler* v. *Moreland*, 6 Paige, 274. (2) Ibid.
(3) Ibid.

sufficient to satisfy the debt, it will be a good answer to the bill that an execution has not been issued to that county.(1)

And if there are several defendants in the judgment, executions should issue against the property of all before this court is resorted to, except perhaps where one is a mere surety. In such case the fact of suretyship, and that the suit is instituted with the assent of the surety and for his benefit should be alleged.(2)

Where a judgment has been recovered on a bond, and there is an accompanying mortgage, the latter need not be foreclosed, before a judgment creditor's bill may be filed.(3)

7 When an assignment is also impeached.

It is very usual to bring before the court upon these bills an assignment made by the judgment debtor with a view to setting it aside as fraudulent.(4) This is an union of the two classes of cases of which the chancellor speaks in *Beck* v. *Burdett*, (1 Paige, 308,) the one where the issuing of an execution gives the plaintiff a lien upon property but he is compelled to come to this court for the purpose of removing some obstruction fraudulently or inequitably interposed to prevent a sale; the other to obtain satisfaction of his debt out of property of the defendant which cannot be reached by an execution at law.

With regard to the relief sought by removing a fraudulent or inequitable impediment, it is not necessary for the judgment creditor even to sue out an execution where the property in question is real estate.(5) And perhaps the same rule applies to personal property liable in its nature to an execution, but stated in the bill as incapable of being reached in consequent of a fraudulent assignment.(6) However it is unquestionably most prudent to have the execution returned.

8 Not barred by a foreign judgment upon the original judgment.

Such a bill is not barred by a recovery of a new judgment in a foreign court in an action of debt upon the judgment in this state. The original judgment is not merged in the latter.(7)

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(1) *Child* v. *Brace*, 4 Paige, 314. (2) Ibid.

(3) *Palmer* v. *Foot*, in Chancery, March 5th, 1839.

(4) *McElwain* v. *Willis*, 3 Paige, 506; *Boyd* v. *Hoyt*, 5 Paige, 65; *Garcia* v. *Rogers*, in Chancery, June 1838; *Butler* v. *Stoddard*, in Chancery, April 17th, 1838; *Hart* v. *Acker*, March 20, 1838.

(5) *Clarkson* v. *Depeyster*, 3 Paige, 320. Mitford's Pl. p. 127.

(6) See *McElwain* v. *Willis*, 3 Paige, 506.

(7) *Bates* v. *Lyons*, in Chancery, March 6th, 1838.

9
No inquiry into the judgment.

This court will not upon such a bill inquire into the validity of the judgment. The party must seek redress in the court of law.(1)

10
Frame of the bill.

The creditor, whether by judgment or decree, must state in his bill either positively or according to his belief, the true sum actually and equitably due on the judgment or decree over and above all just claims of the defendant by way of offset or otherwise. He shall also state that he knows or has reason to believe the defendant has equitable interests, things in action or other property of the value of one hundred dollars or more, exclusive of all prior just claims thereon, which the complainant has been unable to discover and reach by execution on such judgment or decree. The bill must also contain an allegation that the same is not exhibited by collusion with the defendant, or for the purpose of protecting the property or effects of the debtor against the claims of other creditors, but for the sole purpose of compelling payment and satisfaction of the complainant's own debt.(2)

The bill must be verified by the oath of the complainant, or in case of his absence from the state or other sufficient cause shown, by the oath of his agent or attorney.(3)

If the bill does not contain the averments prescribed by the 189th rule, it may be demurred to.(4) See the form of a bill, Appendix, No. 244.

11
Parties.

The judgment creditor may file a bill for his own benefit only, without making other judgment creditors in the same situation parties.(5) Judgment creditors may however unite in such a bill if they think proper.(6) In this case I presume the funds recovered would be divided rateably.

It is a question whether in case of several uniting in one bill, and one of them fails to prove his judgment and execution returned, the bill should be dismissed as to all.(7)

In general all the parties against whom the judgment is recovered should be made parties to the bill. But if it is distinctly

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(1) *Hone* v. *Woolsey*, 2 Edw. 289.
(2) Rule 189.
(3) Rule 190.
(4) *McElwain* v. *Willis*, 3 Paige, 505.
(5) *Wakeman* v. *Grover*, 4 Paige, 23.
(6) *Lentilhon* v. *Moffat*, 1 Edw. 451.
(7) Ibid.

stated in the bill that some of them are wholly insolvent and destitute of property, they may be omitted.(1)

To sustain the suit in this court, it is not necessary that each of the defendants should have property to the value of $100. It is sufficient if all the joint debtors collectively have property exceeding in the aggregate that sum, and applicable to the satisfaction of the judgment.(2)

Even where one joint debtor has not been served with process at law, it is proper to make him a party in this court; for although his separate property cannot be reached directly, yet his co-defendants may claim contribution if compelled to pay the debt.(3)

Under a former subdivision, (ante, sub. 7, p. 119,) it was stated that the impeachment of an assignment may be united with the ordinary object of these bills. In such a case the assignee and assignor alone may be made parties to the bill. It is not necessary to bring in the creditors provided for by the assignment.(4)

If the debtor has conveyed different portions of his property to different persons in fraud of his creditors, all the grantees may be united in one bill with the grantor.(5) And in like manner where the bill is to reach equitable interests or choses in action, two or more persons indebted to the judgment debtor at different times, or for distinct sums, may be joined in the bill.(6)

A debtor to the judgment debtor may be made a party to the bill, to procure payment of the money owing him. He is not a necessary party. In such case, his costs, by the ordinary practice, should be paid out of the fund recovered. If there is no fund, the complainant is frequently compelled to pay them himself.(7)

Where an execution had been issued by the original plain-

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(1) *Van Cleef* v. *Sickles*, 5 Paige, 506; *Child* v. *Brace*, 4 Paige, 300.
(2) *Van Cleef* v. *Sickles*, 5 Paige, 506.
(3) *Van Cleef* v. *Sickles*, 5 Paige, 506.
(4) *Wakeman* v. *Grover*, 4 Paige, 23.
(5) *Fellows* v. *Fellows*, 4 Cowen, 682.
(6) *Boyd* v. *Hoyt*, 5 Paige, 77.
(7) *Stafford* v. *Mott*, 3 Paige, 100.

tiffs, and the judgment was then assigned, the filing of a bill by the assignee without issuing an execution himself, was held irregular.(1)

12 What will confer jurisdiction with regard to amount.

The amount of the judgment, and the amount of the defendant's property, as claimed by the complainant, must each exceed $100, to constitute a matter in dispute and give jurisdiction.(2)

If the bill contains the general allegation only as to the property and effects of the defendant, without pointing out any specific property in the hands of his debtors or trustees, it will be dismissed with costs if it turns out that he had no property which could be reached under the judgment.(3) It may be different if specific property is pointed out in the bill as belonging to the defendant, and some good reasons appear why the complainant may have thought it applicable to his judgment.(4)

13 Amendment of bill.

Creditors' bills may be amended, of course, in the same manner as bills not sworn to, if the additions are merely in addition to, and not inconsistent with, what is contained in the original bill. But the amendments must be verified by oath, in the same manner as the bill is required to be verified.(5) See also 43d Rule, and this Treatise, Vol. I., cap. 9, § 3, tit. Amendment.

14 Injunction.

The injunction is obtained in the usual manner, upon application to the proper officer. See the form of an injunction, both against the debtor and an assignee, Appendix, No. 246.

A special clause may be inserted in the injunction, restraining the debtor from confessing judgment for the purpose of giving any other creditor a preference over the complainant, or from doing any other act to enable other creditors to obtain the property of the debtor, which the complainant was unable to discover, or reach by execution.(6)

The granting of the injunction is a matter of course, if the bill is framed to meet the 189th rule. The return of the execution unsatisfied presupposes that the property of the defendant, if he has any, will be misapplied.(7)

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(1) *Wakeman* v *Russell*, 1 Edwards' Rep., 1st circuit, 510.
(2) *Smetts* v. *Williams*, 4 Paige, 366. (3) Ibid.
(4) Ibid., and *Fitzhugh* v. *Everingham*, 6 Paige, 30.
(5) Rule 190. (6) Rule 195.
(7) *Bloodgood* v. *Clark*, 4 Paige, 577.

No such injunction shall be construed to prevent the debtor from receiving and applying the proceeds of his subsequent earnings to the support of himself or his family, or to defray the expenses of the suit, or to prevent him from complying with any order of this court made in any other cause, to assign and deliver his property and effects to a receiver; or to restrain him from making the necessary assignment to obtain his discharge under the insolvent laws, unless an express provision to that effect is contained in the injunction.(1)

2

The injunction shall not prevent any other creditor from levying upon such property of the debtor as he may be able to find and to reach by execution, previous to the entry of an order for sequestration, or for the appointment of a receiver.(2)

15 Answer required.

By the 191st Rule, the complainant, if he require an appearance and answer under oath, must cause a written or printed copy of that rule to be served on the defendant at the time of the service of the subpœna, with a notice that an entry of his appearance, and an answer on oath is required; otherwise the defendant shall not be answerable for the costs of the proceedings to compel an appearance and answer. See copy Rule and Notice, Appendix, No. 247.

16 Submission by defendant to an examination.

By that rule it is provided, that the debtor against whom such bill is filed, shall not be subjected to the expense of putting in an answer, if he shall cause his appearance to be entered within twenty days after the return day of the subpœna, and shall within twenty days after service of a copy of the bill and notice of the order to answer, deliver to the complainant or his solicitor, a written consent that an order may be entered taking the bill as confessed; and for the appointment of a receiver, and for a reference to take the examination of the defendant, in conformity to such rule. See Appendix, No. 248.

Upon presenting the written consent to the court, the complainant may have a special order, directing the bill to be taken as confessed by the debtor, and referring it to such master as the court may designate in such order, to appoint a receiver, with the usual powers, and to take from him the requisite security.

This order shall also direct the defendant to assign, transfer, and deliver over to the receiver, on oath, under the direction of

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(1) Rule 195. (2) Rule 195.

the master, all his property, equitable interests, things in action, and effects; and that he appear before the master from time to time, and submit to such examination as the master shall direct, in relation to any matters which he might have been legally required to disclose, if he had answered the bill in the usual manner,

It has been decided by the vice-chancellor of the first circuit, that after a defendant has given the notice under this rule, he cannot be compelled to answer the bill in the usual mode.(1)

17 Order for examination, &c.

The order for the examination of a defendant, when a consent is given under the 191st Rule, will be found, Appendix, No. 249, and where it is obtained in the ordinary course, Appendix, No. 250.

They differ in this important particular; that the clause in the former order, authorizing the examination to all the matters of the bill which the defendant would be required to disclose if he had answered the bill, is omitted in the latter.(2)

This order does not require, upon its true construction, that the defendant should deliver over property which is by law exempt from execution, or his earnings subsequent to the filing of the bill.(3)

18 Examination of defendant and witnesses.

The examination under the order, whether obtained under the 191st Rule or otherwise, is to be directed to the ascertaining what property is in the possession of the defendant, or under his control, for the purpose of seeing whether it is all delivered over to the receiver. The complainant may also examine witnesses, to ascertain whether there is any property in the hands of other persons to which the receiver is entitled under the order, to enable the receiver to take the necessary steps for its recovery.(4)

But I apprehend, when the examination is not under the 191st Rule, witnesses can only be examined upon the point of the property of the defendant, but neither witnesses nor the defendant as to other matters charged in the bill. The examination under that order is a substitute for an answer. Hence it is to extend to every point made in the bill. But if the order

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(1) ——— v. ———, 1 Edwards, 466.
(2) *Fisher* v. *Shaw*, in Chancery, December, 1838.
(3) *Fitzhugh* v. *Everingham*, 6 Paige, 30. (4) Ibid.

is obtained in the ordinary mode as in other suits, it is to be confined to the discovery of property only.

The defendant cannot be required to deliver up property which he swears is not in his possession or under his control.(1) The master should not allow the interrogatories to extend beyond the legitimate purpose of obtaining a delivery of the property in which the defendant has a right or control. If he does so, the proper course is to bring the question before the court by an appeal from the master's decision.(2) In the case of *Gihon* v. *Shaw*, and another, (in Chancery, December, 1838,) the defendant had been required to answer the bill. The usual order for a receiver and an examination was obtained. An answer was then filed and a replication. Before proofs were gone into before the examiner, the examination under the order took place. Upon taking the proofs in the examiner's office, this examination was offered as an exhibit to be used at the hearing to falsify the answer. A motion to suppress the examination was denied by the vice-chancellor and his order affirmed.

The chancellor upon the subject of these examinations observed that in *Fitzhugh* v. *Everingham*, (ante,) it was decided that under the common order upon a creditor's bill, the complainant could only examine the defendant on oath in relation to the subject matter of the controversy; that if irrelevant or improper questions are put to him, he should refuse to answer, which refusal is in the nature of a demurrer to an interrogatory, and then the question will be brought before the court, upon an application to compel him to answer, and to punish him for a contempt. That counsel, however, should be careful as to advising their client not to answer in such cases, unless the question is clearly irrelevant or improper, as the client will have to pay the costs of the application to the court, if it turns out that he is in the wrong, and may be further punished for his contempt in not answering. And in such case, if the counsel has advised him not to answer, where there was no real doubt as to the propriety of the question, or where the answer could not prove injurious to the client if he was an honest man, the counsel will himself be liable to the client for the damage the latter has sustained by such improper advice. The chancellor further said, that where the question is relevant and proper, the defend-

(1) *Fitzhugh* v. *Everingham*, 6 Paige, 30. (2) Ibid.

ant must answer it, although he may have been required to answer as to the same matter on oath, in response to the allegations of the bill, and although he has not given a written consent under the 191st Rule, so as to entitle the complainant to insert a clause in the order of reference to take his examination on oath, as to all the matters in the bill as a substitute for an answer in the usual form. The chancellor also held as a rule of evidence, that whether the answers given were to questions relevant and proper under the order of reference or not, was immaterial upon the question of admitting the answers to be read as evidence against the defendant making them.

The mode of interrogation, by interrogatories or orally, is in the master's discretion.(1) The most common practice, in New-York, is to examine by interrogatories. The expense of taking down the examination of the defendant, under the 191st Rule, shall be paid to the master by the complainant in the first instance, and may be taxed and allowed to him as part of his necessary costs in the suit.(2)

19 Receiver.

A receiver may be appointed before answer, and it has become almost a matter of course in these cases, to appoint one upon motion. The return of the execution unsatisfied presupposes that the defendant's property, if he has any, will be misapplied. If, therefore, the right of the complainant is not denied by the defendant, in answer to the application, a receiver will be appointed. It is not a sufficient answer to say, there may not be any property to protect.(3)

The practice is very common in New-York, to give notice of an application for a receiver when the subpœna is served, fixing the time of the application for a motion day after the return day, or which seems most proper, after the time limited for entering an appearance. In England, no special motion for an injunction can be made till after appearance; of course not for a receiver.(4) Our practice seems conformable to the principles which have regulated our system(5)

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(1) Compare Rule 191 and 105. (2) Rule 191.

(3) *Bloodgood* v. *Clark*, 4 Paige, 576.

(4) *Hill* v. *Rimell*, 2 Mylne & Craig, 641.

(5) Perhaps there is an average of half a dozen such motions every motion day.

The court will appoint a receiver notwithstanding the defendant's swearing, upon the motion, that he has not $100 in property over and above the just claims thereon. The complainant may obtain a decree for a part of his claim, if not the whole, although he may have to pay the costs of the defendant if he fails to show that the property exceeds $100. Such an affidavit is therefore no defence to the suit, or to the application for a receiver. The latter may be necessary to collect and preserve the property during the litigation, though it may not be worth half that sum. If the defendant has property, it is for his interest that it should be preserved during litigation; if he has none, there will be nothing for the receiver to do, and the complainant must pay the costs.(1)

It is the duty of the complainant, after obtaining an injunction restraining the disposition by the defendant of his perishable property, or the collection of his debts, to apply to the court, and obtain the appointment of a receiver, or to make some other provision for the collection of the debts, and the preservation of the property.(2)

Under the order for the appointment of a receiver, the master shall ascertain, if practicable, by the oath of the defendant or otherwise, whether any other suit has been commenced. The complainant therein shall have notice to attend before the master, and shall likewise have notice of all subsequent proceedings in relation to the said receivership before the master or the court, in like manner as if he were a party to the suit in which the receiver is appointed; and he may except to the report, or apply to the court for directions to the receiver in like manner.(3)

When another suit is commenced after the appointment of a receiver, the same person may be appointed receiver in such subsequent suit, and shall give such further security as the master, executing such last order, shall direct.(4)

Where a judgment creditor had obtained a receiver upon his bill, and another had proceeded to an injunction only, prohibiting the collection of debts, and preserving the property from waste, on a motion that the defendant deliver books and

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(1) *Fitzhugh* v. *Everingham*, 6 Paige, 30.
(2) *Osborne* v. *Heyer*, 2 Paige, 342.
(3) Rule 194. (4) Ibid.

papers to the receiver, the defendant set up the injunction. It was ordered that the whole of the property and effects, in the hands of the defendant, be delivered over to him, with the books and papers.(1)

An order had been obtained in a creditor's bill that the defendant assign and deliver over his property to a receiver, but before the summons to attend the master for that purpose was served, a creditor's bill had been filed against the complainant in the first suit who had assigned all his property to a receiver; such receiver served notice of the assignment upon the defendant in the first suit, and required him to pay all monies due to the complainant in that suit to him such receiver. It was held that the complainant in the first suit had no right to proceed therein for the purpose of compelling an assignment to the receiver in his suit.(2)

Where several bills are filed by different creditors against the same debtor, no more than one receiver of his property and effects shall be appointed unless the first appointment has been obtained by fraud or collusion, or unless the receiver is an improper person to execute the trust.(3)

The receiver shall give security sufficient to cover the whole property and effects of the debtor which shall come to his hands by virtue of his office, and he shall hold such property and effects for the benefit of all creditors who have commenced, or shall commence, similar suits during the continuance of his trust, to be disposed of according to their legal or equitable priorities.(4)

As to the mode of proceeding, fixing the amount of security to be given, &c., the following is the practice adopted by one of the most experienced masters in New-York.(5) "The first summons is underwritten to proceed in the appointment of a receiver, &c.; the personal attendance of the defendant being required." The object of this attendance is to ascertain whether other bills have been filed against the defendant, and the summons is to be served personally. Upon the attendance of the defendant he is examined as to other bills filed against him,

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(1) *Osborne* v. *Heyer*, 2 Paige, 342.

(2) *Sedgewick* v. *Cleaveland* and others, in Chancery, December 4th, 1838.

(3) Rule 193. (4) Rule 193. (5) S. Cambreling, Esq.

and also generally as to the amount of property which would probably pass into the hands of the receiver. If the defendant state that he has no property, the bond is taken in a nominal amount of $500 or $1000, if the complainant is content with that sum. If not, the penalty is regulated by the amount of the judgment, being usually double such amount. The bond is executed to the people by the receiver and two sureties, each of whom justify in the amount of the penalty. If the defendant on the first hearing says he has property, the penalty of the bond is then determined by reference to the amount of property sworn to by the defendant, the penalty being made sufficient to protect the defendant. At this first hearing the defendant is not usually examined in detail as to his property, unless he seeks to embarrass the appointment of the receiver by magnifying his property, with a view to requiring a heavy bond, as is sometimes done. In such cases, the complainant's counsel is allowed to interrogate him as to the particulars of his property, in order to ascertain its true value.

I then determine the amount of the bond. And the receiver is proposed and the bond is executed and acknowledged as a deed of real estate under the new rule.

If the defendant states that other bills are filed against him I proceed no further, but direct a summons to be served on the solicitor of the complainant in the other suits, and upon the return of that summons proceed as before.

If the defendant does not attend in person, I ascertain by the oath of his solicitor, or by the oath of the complainant's solicitor, as to there being other bills filed against the defendant. The complainant's solicitor having previously made inquiries in order to ascertain the fact as far as practicable.

When the bond is duly executed and acknowledged, it is left with me for my approval. I file it and make my report of the appointment. After the confirmation of my report, I issue a summons with an underwriting "to proceed in the assignment and delivery over to the receiver of the property, &c., of the defendant, and in the examination of the defendant under oath, the personal attendance of the defendant being required." The examination of the defendant is by written interrogatories and answers taken down by me. This is my uniform practice in

the examination, not only of the defendant but of other persons, as I have found it the least embarrassing and most satisfactory to all parties, particularly in reference to any application to the court founded on these examinations, as they exhibit more truly not only the facts, but the manner of testifying of the persons under examination.

In proceeding under the 191st Rule, I proceed in the same manner, by written interrogatories and answers, taken down by me.

The receiver cannot pay over the funds in his hands to the parties, or to any other person, without being specially authorized to do so, by an order or decree of the court.(1) The receiver cannot be discharged from his trust without a special order to be obtained upon a written consent of all the parties interested in the property in his hands, or upon due notice of the application.(2)

Where the same person has been appointed receiver in several different suits upon creditor's bills before the chancellor and different vice-chancellors, and there are conflicting claims between the parties in the different suits as to the distribution of the funds, the jurisdiction to decide such claims and to direct the distribution, belongs primarily to the judge under whose authority such receiver was first appointed.(3)

The receiver is to keep a separate account of any property or effects of the debtor which have been acquired since the commencement of the first suit, or which may be assigned to the receiver under the appointment in any subsequent cause.(4)

The receiver has the following powers by the general rule (the 192d) unless specially restricted by the court. He may sue for and collect all the debts, demands, and rents belonging to such debtor, and may compromise and settle such as are unsafe and of doubtful character. He may also sue in the name of the debtor where it is proper or necessary for him to do so; and he may apply for and obtain an order of course that the tenants of any real estate belonging to the debtor, or of which

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(1) Rule 193.
(2) Ibid.
(3) *Burrall* v. *Leslie*, 6 Paige, 445.
(4) Rule 194.

he is entitled to the rents and profits, attorn to such receiver and pay their rents to him.(1)

The receiver may also make leases from time to time as may be necessary, for terms not exceeding one year. He shall convert without any unreasonable delay all the personal estate and effects into money; but he may not sell any of the real estate of the debtor without the special order of the court.(2)

If the receiver sue an insolvent, he shall not be allowed the costs of the suit, unles it is brought by the order of the court, or by the consent of all persons interested in the funds in his hands. But he may sell such desperate debt, and all other doubtful claims to personal property, at public auction, giving at least ten days public notice of the time and place of such sale.(3)

The receiver is subject to the provisions of the 151st Rule, and if he neglect to file his inventory and render his annual account, he will be charged with the expense of the proceedings to compel him to file the same.(4)

20 Assignment.

Where the usual order of reference has been made to appoint a receiver, and that the defendant assign to the receiver, on oath, all his property, equitable interests, &c., although the defendant swear upon his examination that he has no property whatever, he will be compelled to make the assignment.(5)

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(1) Rule 192. (2) Rule 192.
(3) Rule 192. (4) *In re Seaman*, 2 Paige, 409.
(5) *Chipman* v. *Sabbatan*, in Chancery, December 30, 1837. The vice-chancellor had refused in this case to allow an attachment against the defendant for refusing to execute the assignment. Upon appeal, the chancellor held that the defendant was bound to make a formal assignment, in order to enable the receiver to attest the validity of any assignment which might previously have been made of the debtor's property, and to bring a suit in his own name in cases in which he was authorized to sue in that manner at law or in equity. If the defendant swore he had no property, choses in action, &c., in his possession, or under his control, a formal assignment would be sufficient, unless it appeared by other testimony that he had sworn falsely as to such property.

Where it appears upon his examination or other testimony, that there is any property or choses in action, the assignment should set forth such property specifically. It is sometimes specified in the body, and sometimes in a schedule. See the form of such assignment, Appendix, No. 251.

CHAPTER 30.

FORECLOSURE OF MORTGAGES.

THE course of a strict foreclosure of a mortgage, which with few exceptions is the only mode of proceeding in England, is recognised in our court, and is sometimes resorted to. But for a very long period, the court has exercised the power of selling the property comprised in a mortgage under a decree.(1)

SECTION I.

FORECLOSURE AND SALE.

1 Jurisdiction of the subject

The court is by the act now in force, expressly authorized to decree a sale of mortgaged premises, or such part thereof as may be sufficient to discharge the debt and costs, whenever a bill shall be filed for the foreclosure or satisfaction of a mortgage.(2)

2 What proceedings at law may be had.

After the bill is filed, while it is pending, and after a decree rendered, no proceeding shall be had at law for the recovery of the debt secured by the mortgage or any part thereof, unless authorized by the court of chancery.(3)

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(1) Office and duties of masters in chancery, p. 211.

(2) 2 R. S., 191, § 157. This power was implied in the former act, 1 R. L., p. 490, § 11, and 493, § 21. The earliest act in which it was recognised, was that of April, 1801. *Webster & Skinner*, 443. The court exercised the power, however, under the Colonial Government.

(3) 2 R. S., 191, § 159.

And the court is authorized not only to compel the delivery of possession of the premises to the purchaser, but also to decree payment of the balance of the mortgage debt that may remain unsatisfied after a sale of the premises, and to issue execution therefor.(1)

And, by another provision, no action of ejectment shall be maintained by a mortgagee, or his representatives or assigns, for the recovery of the possession of the mortgaged premises.(2)

Thus it will be seen, that exclusive jurisdiction of all remedies for the recovery of the money, is vested in this court after a bill has been filed, and is pending; that the mortgagee cannot proceed at law to get possession by the former remedy of ejectment. There remains but one other mode to which he may resort exclusive of this court.

The mortgagee, before filing a bill, may commence an action at law upon his bond, and may procure satisfaction in that mode, if he can. But if a judgment has been obtained for the money, or any part of it, no proceeding shall be had in this court, unless the sheriff shall have returned to an execution that it is unsatisfied in whole or in part, and also that the defendant has no property whereof to satisfy it, except the mortgaged premises.(3)

Under this section, proceedings may be had upon the mortgage against the premises in this court, where the whole or a balance remains uncollected upon an execution, and the sheriff returns that there is no other property than what has been levied upon, except the mortgaged premises.

A sale of the mortgaged premises, under an execution upon the judgment is prohibited by statute.(4) A great difficulty arose in the entangled case of *Tice* v. *Annin*, (2 Johns. Ch. Rep., 129,) and the revisers proposed a section to meet it which has not been adopted. It was provided, (reported section 129,) that if the mortgaged premises, or any part thereof, had been sold under a judgment for the debt secured by the mortgage, or for any part thereof, the bill should be dismissed, and the sale be deemed an extinguishment of the mortgage,

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(1) 2 R. S., § 158.
(2) Ibid. 312, § 57.
(3) Ibid. 192, § 162.
(4) 2 R. S. 368, § 31.

but not a satisfaction of the debt, beyond the amount raised by such sale. And by their 127th section, the bill was to set forth whether any collection of the debt which had been made, was made on a sale of the mortgaged premises, or any part thereof.

However, a sale under the execution is now forbidden, and the attorney must endorse upon the execution when issued a brief description of the mortgaged premises, referring to the page and book of the record of the mortgage, with a direction not to levy upon the same.(1)

3 Frame of bill.

In order to enable the court to carry these provisions into effect, it is directed that upon filing a bill for the foreclosure or satisfaction of a mortgage, the complainant shall state therein, whether any proceedings have been had at law for the recovery of the debt secured thereby, or any part thereof; and whether such debt, or any part thereof, has been collected.(2) See the form, Appendix, No. 252.

It is provided by rule, that in a bill for the foreclosure or satisfaction of a mortgage, it shall not be necessary or allowable to set out at length the rights or interests of the several defendants who are purchasers of, or who have liens on the equity of redemption in the mortgaged premises, subsequent to the registry, or recording of the complainant's mortgage, and who claim no right in opposition thereto.(3)

The complainant, after setting out his own right and interest in the premises, may state generally that such defendant's have, or claim some interest in the premises as subsequent purchasers or incumbrancers, or otherwise.(4) See the form of this allegation in the precedent, Appendix, No. 252.

If any such defendants are, by the misstatement of the complainant in his bill or otherwise, unnecessarily compelled to put in an answer to protect their rights, the costs occasioned thereby may, in the discretion of the court, be charged on the complainant personally.(5)

And in addition to this loss of his own costs, if the complainant has so misstated the rights of any one of the defendants, so that their equitable interest in the surplus, or in the equity of

(1) 2 R. S., 368, § 32. (2) 2 R. S., 191, § 161.
(3) Rule 132. (4) Ibid. (5) Ibid.

redemption, might be affected if they should suffer the bill to be taken as confessed, he may be charged personally with so much of the defendants' costs as have been rendered necessary by such misstatements.(1)

If, however, such defendants unnecessarily put in an answer to such bill, the extra costs occasioned by such answer may be charged on the defendants personally, in the discretion of the court.(2)

The defendants, or either of them, may, however, in such a case, except to the bill for impertinence, and thus avoid putting in an answer. But if this is not done, the taxing officer must disallow all extra charges or expenses which have arisen from the insertion of the useless statements.(3)

If the mortgage debt be secured by the obligation or other evidence of debt, (executed after the passage of the Revised Statutes,) of any other person besides the mortgagor, the complainant may make such person a party to the bill, and the court may decree payment of the balance as well against such other person as the mortgagor, and enforce such decree as in other cases.(4)

4 Notice of object of suit.

The complainant may deliver to any defendant, at the time of serving the subpœna, a written or printed notice subscribed by the complainant or his solicitor, stating that the suit is instituted to foreclose a mortgage, and giving a brief description of the mortgaged premises, the sum for which the mortgage was executed, its date, and if registered, the time of the registry, and that the complainant makes no personal claim against such defendant.(5) See the form, Appendix, No. 253.

If a defendant on whom such notice has been served appears and disclaims, he shall not recover costs, but shall pay costs to the complainant; and if the complainant neglects to serve such notice, by reason whereof a defendant is put to unnecessary costs in employing a solicitor to defend the suit, such costs may be charged personally on the complainant at the discretion of the court.(6)

5 Notice to clerk of county.

The complainant, immediately after filing his bill, must file with the clerk of the county in which the mortgaged premises

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(1) *Union Insurance Company* v. *Van Rensselaer*, 4 Paige, 86.
(2) Ibid. (3) Ibid. (4) 2 R. S., 191, § 160.
(5) Rule 133. (6) Ibid.

are situate, the notice which by law is required to render the filing of the bill constructive notice to subsequent purchasers of the premises.(1) See Appendix, No. 253.

The ordinary proceedings are then to be resorted to, to obtain answers, or have the bill taken as confessed. These are before detailed.

6 Interest, or instalments only due.

Whenever a bill shall be filed for the satisfaction or foreclosure of any mortgage, upon which there shall be due any interest, or any portion or instalment of the principal, and there shall be other portions or instalments to become due subsequently, the bill shall be dismissed upon the defendants' bringing into court at any time before the decree of sale, the principal and interest due with costs.(2)

If however, a decree of sale has been entered, and the defendant brings the amount due into court, the proceedings shall be stayed; but the court shall enter a decree of foreclosure and sale, to be enforced by a further order of the court upon a subsequent default in the payment of any portion or instalment of the principal, or of any interest thereafter to grow due.(3)

Some points of practice arise under these statutory provisions.

First. If the decree of sale has not been entered, the bill shall be dismissed upon bringing into court the amount of principal or interest due with costs; that is, I presume, the instalment and interest due in the one case, or the interest due in the other.

But, *Secondly.* If a decree of sale has been entered and the defendant shall bring into court the amount due with costs, proceedings are stayed, but a decree is to be entered to be enforced upon a subsequent default. This language imports, nay seems to make it necessary, that there should be two decrees.

I do not know of any decision as to the practice on this point. It seems to me that upon the money being brought in, the cause may be again noticed for hearing, and the decree embodying the provision to enforce it upon a future default, be entered. The complainant may certainly take this course until the point is settled. And it may be that a less expensive mode may be resorted to.

If the defendant applies to pay the money in on notice, the

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(1) Ibid. See Vol. I. p. 75.
(2) 2 R. S., 192, § 167.
(3) 2 R. S., 192, § 168.

court might at once direct the stay of proceedings, upon his submitting to such a decree.

But if he pays it in without notice, and then gives notice to the complainant, is this a stay of itself by that statute? If so, the complainant must take some step to get his decree. A petition might possibly be sufficient without bringing on the cause at a term.

Another important decision where the whole sum is not due is this. That a widow who has joined in the mortgage retains her interest in the rents and profits until foreclosure, and if the sum actually due can be raised by the sale of one or more of the parcels, she has a right to continue in the receipt of the rents of the residue until the debt becomes due.(1)

And hence it follows also, that in such a case the judgment creditors of the mortgagor will take the rents and profits not taken by the widow, in preference to the mortgagee, who is only a specialty creditor.

If the whole sum is due, and the premises are of insufficient value, the court will appoint a receiver of the rents at any time after the bill is filed.(2) Where a long credit is given, it is therefore advisable to take a pledge of the rents and profits for security.(3)

The chancellor said that previous to the Revised Statutes, the court could decree a sale of the whole premises or a part only as should be most conducive to the ends of justice, although part only of the debt was due. But that power had been somewhat restricted by the statute. That the provision of the 163d section, 2 R. S. 193, was imperative and could not be departed from except in cases where the complainant had some equitable claim upon the rents and profits of the premises which will accrue before the mortgage debt becomes payable.

7 Order of reference.

If the bill has been taken as confessed, or the right of the complainant as stated has been admitted by the answer, the complainant may have an order of course referring it to a master to compute the amount due to him, and to such of the defendants as are prior incumbrancers of the mortgaged premises.(4) Appendix, No. 254.

So if the defendant is an infant, and has put in a general

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(1) *Bank of Ogdensburgh* v. *Arnold*, 5 Paige, 38.
(2) Ibid. (3) Ibid. (4) Rule 134.

answer by his guardian, the complainant may have an order of course, referring it to a master to take proof of the facts and circumstances stated in the bill, and to compute the amount due on the mortgage, preparatory to the hearing of the cause.(1) Appendix, No. 255.

Where interest, or a portion only of principal is due, and an order is entered under the 134th rule, it may contain a clause that the master ascertain and report the situation of the mortgaged premises, and whether the same can be sold in parcels without injury to the interests of the parties.(2) Appendix, No. 256.

Where the defendant is an absentee it is proper to insert in the order a clause that the master take proof of the facts and circumstances stated in the bill; that he examine the complainant under oath as to any payments which may have been made to him or to any person for his use on account of the demand mentioned in the bill, and secured by such mortgage, and that he report the proofs and examinations had before him.(3)

Where the bill seeks payment of the money as due from the absentee, or that the debt is a lien upon property in which the absentee has an interest as subsequent incumbrancer or otherwise, the reference and examination must be had, although there are other defendants in the suit who appear and contest the complainant's claims, and who have a common interest with the absentees in defending the suit.(4)

And the order of reference may be entered under the 25th rule of court, notwithstanding there are other defendants contesting the right of the complainant.

In such a case of contest, the order cannot be entered under the 134th rule, but this does not deprive the complainant of his right to an order of course under the 25th rule.(5)

It may be deduced from the case of *Corning* v. *Baxter*, that in general, if the ground of defence of some defendants extends to the whole demand, the order of reference should not direct

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(1) Ibid. (2) *Everitt* v. *Hoffman*, 1 Paige, 648.

(3) 2 R. S., 187, § 134, 135; *Corning* v. *Baxter*, in Chancery, September, 1836. Reported 6 Paige.

(4) *Corning* v. *Baxter*, *ut supra*.

(5) *Corning* v. *Baxter*, *ut supra*. The note to the precedent (ante, Vol. I. Appendix, p. 79) is inaccurate, so far as it applies to the case of a simple reference under the 25th rule.

a computation of the amount due; though it may, where the success of the litigating party would only extend to a part of the property covered. The chancellor says, "The complainant asks for permission to insert in the order of reference, a direction to the master, to compute the amount due upon the mortgage. And as this amount must be ascertained, even if the defendant who has answered succeed in defeating the claim of the complainant, as to that part of the mortgaged premises which was the subject of the release, I see no objection to the reference to make that preliminary inquiry in this stage of the cause. It will also save the extra expense of a separate reference to compute the amount due."

If proofs have been taken in chief, prior to the entry of the order, liberty will be given to use them upon the reference against the absentee. An application for that purpose should be made to the court.(1)

In cases of a contest of the complainant's rights, and where the order of course cannot be entered, the proofs must be taken in the usual manner, and the cause brought on, unless there are special circumstances which will induce the court to make preliminary inquiries previous to a hearing by an order of reference. In such cases a special application must be made to the court.(2)

The order of reference under the 134th rule, to compute the amount due to the complainant and prior incumbrancers, is only proper where the rights of the complainant as stated in the bill, are admitted in the answer. Where the defendants set up a claim of priority adverse to the claim of the complainant, the master is not authorized to settle the question. He should ascertain the amount due upon the assumption that the answer is correct, leaving the question of priority to be settled by the court.(3)

The general course of proceeding before the master has been stated in the author's former work, (office, &c., p. 203.) The following are the material variations, and new points of practice decided since that publication.

8 Taxes, &c. allowable.

In computing the amount due upon a mortgage, the master cannot allow the complainant the amount of a premium paid for an insurance of the mortgaged premises, unless it was paid

(1) *Corning* v. *Baxter*, *ut supra*. (2) Ibid.
(3) *Harris* v. *Fly*, in Chancery, March 5, 1839.

by express agreement of the mortgagor or owner of the equity of redemption. But the master may allow payments for taxes or assessments which were a lien on the premises.(1)

Interest beyond penalty.

It was stated in the author's former work that the weight of authority was very strong to show that interest could not be computed beyond the penalty of a bond; but that if accompanied with a mortgage, it might be carried beyond it.

In the case of *Mower* v. *Kip*, (2 Edw. 165,) this subject was before the court. The vice-chancellor of the first circuit held, that in foreclosing a mortgage given to secure the payment of a bond, or the money to become due upon the bond, according to its terms and condition, payment to the amount of the penalty must be deemed a full satisfaction, and interest beyond it cannot be allowed. Upon an appeal to the chancellor, he held, that even upon a mere money bond, the principal debtor was both legally and equitably bound for the whole amount of principal and interest, although it should exceed the penalty, and the general rule was otherwise as to a surety. But that at any rate, where there was an accompanying mortgage, the penalty might be exceeded. (6 Paige, 88.)

For the form of the master's report, see Appendix, No. 257.

The cause must be regularly brought to a hearing in term, after the coming in of the report.(2)

9 Affidavit of regularity.

If the bill has been taken as confessed, the complainant shall show to the court at the hearing, by affidavit or otherwise, that the proceedings to take it as confessed have been regular, according to the rules and practice of the court.(3) See Appendix, No. 258.

10 Decree

The decree of sale must contain, unless otherwise specially directed by the court, the provisions specified in the 135th rule of court.

Where the 163d section of the act applies, the whole amount not being due, and the premises can be sold in parcels without injury, the decree will direct a sale in parcels.

As before observed, the court may decree payment of the balance of the mortgage money if there is a deficiency, and issue execution for the same. A provision to this effect is inserted in the decree.

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(1) *Faure* v. *Winans*, Hopkins' Rep. 283.

(2) Rule 134.

(3) Ibid.

It has been decided that this clause can be inserted in the decree against the mortgagor only, not against the surety, at least not so as to make him pay at once. The remedies must be exhausted against the principal by execution before the surety can be resorted to. Still the decree ought to bind the surety. It ought to be such as shall be a lien upon his real estate for the payment of the money.

The statute authorizes the decree for payment of the balance, as well against the surety as the mortgagor. The decision above referred to, settles that this does not make it a joint debt, for which each should be immediately liable. The relation of surety is still sustained.

A mortgage was given by one person, and another mortgage as collateral security for the first, by another, and upon a bill filed, a purchaser of the equity of redemption in the premises in the first mortgage, was made a defendant, and the other defendants were purchasers or judgment creditors of the other mortgagor. It appeared from the bill, that the mortgagor in the first mortgage resided out of the jurisdiction, and had no longer any interest in the premises. A demurrer by the purchaser of the equity of redemption, and by the mortgagor in the collateral mortgage, on the ground that the mortgagor was not made a party, was overruled.(1)

The chancellor said, that this mortgagor was liable to the mortgagee for any deficiency, and unquestionably might have been made a party to the suit; but that he was not a necessary party to a bill against the grantee of the equity redemption. This party could not be benefitted by having the other before the court; the premises were the primary fund to satisfy the demand, unless the mortgagor had conveyed to him with warranty.

But as to the mortgagor in the collateral mortgage, the case was different. He had a right, not only to have the premises included in the mortgage of the principal debtor first resorted to, but also that all personal remedies should be exhausted against him, before the collateral security should be applied. Hence the demurrer would certainly have been well taken as to

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(1) *Bigelow* v. *Bush*, in Chancery, March 7, 1837. MSS. Chan. Walworth.

him, had it not been stated in the bill, that the principal mortgagor and debtor was out of the jurisdiction of the court.

He, however, held, that the surety could obtain no benefit by having the absent mortgagor before the court; that the proceeding against a non-resident was strictly *in rem*, and would not be binding upon him personally beyond our territorial jurisdiction, unless he should voluntarily appear. A decree even would be of no use, because the rights of the surety against the principal debtor would be the same whether he was or was not a nominal party to the suit.

Where interest, or a part of the debt only is due, there can be no decree for the immediate payment of the balance. But if the premises are not capable of a division and the whole must be sold, there may be inserted in the decree, a provision that the deficiency be recovered when the debt becomes due.(1)

If the master reports that the premises can be sold in parcels, and the whole debt is not due, only so much will be sold as will be sufficient to pay the amount then due with costs, although the residue of the premises will be insufficient to satisfy the mortgage money yet to become due.(2)

Where a sale of a parcel had taken place for interest due, and a surplus was brought into court, application was made and an order obtained, when interest again fell due, for payment of such surplus. This was deemed the first fund to be resorted to, before applying to sell another parcel.

The statute provides that where a portion of debt only is due, and one parcel is sold, the decree shall remain as security for any subsequent default: and upon such default the court may, on the petition of the complainant, by a further order founded on such decree, direct a sale of so much of the premises to be made under the said decree, as will be sufficient to satisfy the amount so due, with the costs of such petition, and the subsequent proceedings thereon; and the same proceedings shall be had as often as a default shall happen.(3) But if it appears that a sale of the whole premises will be most beneficial to the

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(1) *Mills* v. *Granger*, November 3, 1831.
(2) *Bank of Ogdensburgh* v. *Arnold*, 5 Paige, 38.
(3) 2 R. S., 193, § 169, 170.

parties, the court may decree sale of the whole in the first instance.(1)

In such case, the proceeds of such sale shall be applied as well to the interest, portion or instalment of the principal due, as towards the whole or residue of the sum secured by such mortgage, and not due and payable at the time of such sale; and if such residue do not bear interest, then the court may direct the same to be paid, with a reduction of the rebate of legal interest for the time during which such residue shall not be due and payable, or may direct the balance of the proceeds of such sale, after paying the sum due, with costs, to be put out at interest, for the benefit of the complainant, to be paid to him, as the instalments or portions of the principal, or the interest may become due, and the surplus for the benefit of the defendant, his representatives or assigns, to be paid to them on the order of the court.(2) See the forms of several decrees of foreclosure and sale, Appendix, No. 259.

11 Notice of sale. The notice of sale where the property is in the city of New-York, must be for three weeks, and be published in one or more of the daily newspapers of the city three weeks immediately previous to the time of sale, at least twice in each week.(3)

All such sales must be made in the county in which the premises are situated, unless otherwise directed by the court in the decree.(4)

Such sale shall be made at public auction, at the Merchants' Exchange, between 12 o'clock at noon and three in the afternoon, unless otherwise specially directed in the decree.(5)

If the lands are in another county, the notice is to be the same as is given by masters and commissioners in partition. See post, chapter 30, sub. 16.

It is proper to insert the title of the cause in the notice of sale, by stating the names of the first complainant and first defendant at length, and adding the words "and others," where there are several complainants or defendants, for the purpose of attracting the attention of those who may be interested.(6)

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(1) 2 R. S., 193, § 171. (2) Ibid. § 172.
(3) Rule 139. (4) 2 R. S., 192, § 163.
(5) Rule 139. By the 200th rule, sales may be made, until the Exchange is rebuilt, at the regular sales room of an auctioneer.
(6) *Ray* v. *Oliver* and others, in Chancery, June 20, 1837.

Where the premises consist of several distinct lots or parcels which can be sold separately, without diminishing the value thereof on such sale, it shall be the duty of the master to sell the same in separate lots or parcels unless otherwise specially directed by the court. But if the master is satisfied that the property will produce a greater price if sold together, than it will in separate lots or parcels, he may sell it together unless otherwise directed in the order.(1)

It has become the general practice in New-York, to make it part of the terms of sale, that all taxes or assessments of which the purchaser shall give the master written notice before the delivery of the deed shall be paid out of the purchase money. See the form of such terms, Appendix, No. 260.

12 Substitution of purchaser.

The practice of permitting a substituted purchaser to take the conveyance from the master has been recognised by the court. It will be, however, without prejudice to any equitable rights or liens of third persons as against the original purchaser which may have become vested before the assignment of his bid.(2)

Where a purchaser under a decree died before conveyance was made, having devised the property in question and all his real estate to trustees, the court authorized a conveyance to such trustees, the heir at law of the purchaser being an infant.(3)

So where the original purchaser had entered into a contract of sale of the premises with another, and had died, and his heir at law was absent, the court ordered the conveyance to be executed to the substituted purchaser, and the money to be brought into court.(4)

13 Setting aside sale, opening bidding.

If any deception has been practised upon a purchaser at a master's sale, the court will relieve him. He will not be compelled to carry the contract between himself and the court into effect, under circumstances where it would not be perfectly just in an individual to insist upon performance. The master must not therefore in his description of the property add any parti-

(1) Rule 138.
(2) *Proctor* v. *Tamar*, 5 Paige, 619.
(3) *The King* v. *Gregory*, 4 Price, 180.
(4) *Pearce* v. *Pearce*, 7 Simons, 138.

culars which may unduly enhance the value of the property, or mislead the purchaser.(1)

Where judgment creditors were prevented from attending and bidding at a sale, in consequence of statements of the master inducing a belief that it would not take place, and the creditors offered an advance upon the bid sufficient to cover their demands, a resale was ordered.(2)

Justice Nelson in the case of *Collier* v. *Whipple*, examines the English authorities, and observes that in England, the mere advance offered would be sufficient to open the bidding before confirmation of the report; that such however is not our practice, and that the reasons for the difference are sound and conclusive; citing *Duncan* v. *Dodd*, 2 Paige, 99. He also states that it is shown by the English cases, that after confirmation the bidding will be opened, if there is fraud or misconduct on the part of the purchaser, or fraudulent negligence on the part of any person connected with the sale as agent of the mortgagor; and also surprise created by the conduct of the purchaser.

The opinion is also valuable as to the control of the master over such sales, and his duty to act for the benefit of all interested, without pursuing the directions of the complainant.

Where infants are the owners of the property, our court listens more favorably to an application for a resale than in other cases. Thus in *Duncan* v. *Dodd*, 2 Paige, 99, the sole ground of the application was the advance proffered, (a heavy one of fifty per cent.) and the fact that the property was the only dependence of two infants, and had been sacrificed through the misapprehension or negligence of their mother and step-father. The chancellor said, "If the defendants had been adults, and the property had been sacrificed through their own negligence, he would not have disturbed the sale."

In *The North River Ins. Co.* v. *Holmes*, January, 1839, before the vice-chancellor of the first circuit, an offer was made of an advance of 25 per cent. upon the bid, upon the ground of the intention of the solicitor to have bid at the sale, and engagements in court preventing him, and that infants were concerned. It was clearly shown that by reason of other incumbrances be-

(1) *Veeder* v. *Fonda*, 3 Paige, 97.
(2) *Collier* v. *Whipple*, 13 Wendell, 224.

sides the mortgage of the complainants, it was impossible for the infants to realize any thing, and that there was no other estate. An application for a resale was denied.

14 Delivery of possession.

The purchaser is now entitled by a statutory provision to the aid of the court in getting possession, as against parties to the suit, or those who have come into possession under them, subsequent to the filing of the notice of the commencement of the suit.(1)

But this court has no jurisdiction in a summary way to determine the rights of third persons claiming title to the premises, who have got possession by legal adverse proceedings against a party to the suit, under a claim of right which accrued previous to the filing of the bill.(2)

15 Enrolment of decree. Deed, &c.

After the sale is made, the solicitor should get his costs taxed, and request the register, to enrol the decree. He should also give notice to the solicitor of all the parties to whom costs are decreed to be paid out of the proceeds, to file their taxed bill within fifteen days, or that the decree will be enrolled without such taxed bill.(3)

The original bill of costs taxed by the proper officer is filed, and it is the practice in New-York for the assistant register to give a certificate of that fact, and of the amount; upon which the master pays. Appendix, No. 261. See the form of the master's deed, Appendix, No. 262. And of his report, No. 263.

By the 111th rule it is provided that if a master is directed to sell real estate under a decree, he may give the requisite notice of sale previous to an enrolment; but to protect the title of the purchaser, the party for whose benefit the sale is made, shall cause the decree to be enrolled, and produce a certificate thereof, before any conveyance shall be executed by the master.

If the mortgage has not been recorded, and has been duly acknowledged or proved, it must be recorded at length in the county where the lands lie before the master executes his deed. If it is not in a situation to be recorded, it must be filed with the register or clerk.(4)

16 Proceedings for *surplus*.

By the present practice of the court those defendants whose claims are upon the surplus only, and who have no right or

(1) 2 R. S., 192, § 152; *Frelinghuysen* v. *Colden*, 4 Paige, 206.
(2) Ibid. (3) Rule 183. (4) Rule 127.

interest in the mortgaged premises in opposition to the complainant's claim, are not permitted to settle their claims to the surplus before it is ascertained by a sale that there will be a surplus, except where their liens are upon different parcels of the premises.(1)

By the 159th section of the act, if there is any surplus it shall be brought into court for the use of the defendant, or of the person who may be entitled thereto.

After the report of the master is confirmed, any defendant may file an affidavit that a surplus has been paid into court, and that he is entitled to the same or some part thereof. Upon this affidavit, an order of course may be entered, referring it to a master to ascertain and report the amount due to such complainant, or to any other person, and which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereupon.(2) See the affidavit and order, Appendix, No. 264.

In executing this order, every defendant who has appeared in the cause, and every person who has left a written notice of his claim to such surplus money with the register, assistant register or clerk, where the sum is deposited, must have notice to attend the master.(3)

The master requires the prosecuting solicitor to produce a certificate of the register, &c., whether any such claims have been filed with him, and the names of the parties: also of the defendants who have appeared. In a case in which a party not a defendant claiming part of the surplus, had omitted to file such claim with the clerk, and the clerk declined to file it after the order had been issued, it was brought before the master. No objection was made, and it was disposed of.(4) It seems to me that this course would be permitted under the equity of the rule. By analogy to the claims of creditors not parties, brought before a master upon a general bill, the rule has sanctioned strangers to the suit filing a claim with the register, which insures them notice. And there does not appear any good reason for refusing them an opportunity to assert their rights without having filed such claim, where they come in due season.

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(1) *Union Insurance Company* v. *Van Rensselaer*, 4 Paige, 86.
(2) Rule 136. (3) Ibid. (4) *Holden* v. *Thompson*, 1836.

When the master has made his report, the usual order of confirmation must be entered, and when it is confirmed, a certificate to that effect should be obtained from the register, &c., and a motion be made for payment of the money. This motion must be upon notice, to all the parties who appeared before the master. The report and such certificate of confirmation will be required on making the motion.(1)

Any person making a claim before the master, and failing in it, may be charged with such costs as the other parties have been subjected to by reason of such claim. And the parties succeeding may be allowed such costs as the court shall deem reasonable.(2) If the surplus remains in court for the term of three months without being applied for, the chancellor shall direct the same to be put out at interest.(3)

SECTION II.

STRICT FORECLOSURE.

Although a strict foreclosure of a mortgage is of rare occurrence in our court, yet there are many cases in which it becomes necessary to perfect a title, or for other reasons is resorted to. See *Benedict* v. *Gillman*, 4 Paige, 58, and *Wilkes* v. *Wells*, Appendix, No. 263.

1 Frame of the bill.

The frame of a bill of foreclosure does not materially vary from that of a bill for a sale, except that the prayer is different. The prayer is set forth in the precedent of such a bill, Appendix, No. 263.

The parties to such a bill are in general the same. All persons who have a right to redeem the premises should be brought in. This right is in all who have a legal lien upon the premises, and all who have an equitable lien known to the complainant.

2 Parties.

An important difference as to parties between such a bill and

(1) The practice was thus settled, 17th March, 1830. MSS. J. Rhoades.

(2) Rule 136.

(3) 2 R. S., § 160.

one for a sale arises from the nature of the relief. If the mortgagee is dead, his heir at law must be a party complainant, because the legal estate to the land is to be vested in him. And the personal representative of the mortgagee must also be a party complainant, as the money, if paid, goes to him.(1)

Where a sale is sought, the personal representatives alone file the bill. They receive the money on a sale, and if previously paid, can discharge the mortgage.

A person entitled to a proportion of the mortgage money cannot file a bill to foreclose the equity of redemption in an equal part of the mortgaged premises. All the parties entitled to the whole mortgage money must be before the court.(2)

Where the bill stated that the mortgage was made to another as trustee for the plaintiff, who had advanced the money, and that such trustee had executed a declaration of trust in writing, it was held that he was a necessary party, because it was his legal estate to be protected by the foreclosure, and he was a necessary party to a conveyance if there was a redemption.(3)

It is however only necessary to make the heir of the mortgagor a party in a bill to foreclose. The personal representative need not be brought before the court.(4)

In the case of *Bradshaw* v. *Outram*, cited in the note, the term had been created solely for the purpose of the mortgage; and it was said at the bar, that it was the practice of Mr. Lloyd to make the personal representative a party.

There is a case cited in Harrison's Practice, p. 30, *Robins* v. *Hodgson*, that where there is one mortgage of freehold and leasehold estates, and the mortgagor dies, both his heirs and executors must be parties to a bill of foreclosure.

Where there is a collateral mortgage given as a security, and a bill of foreclosure is filed against the principal mortgagor,

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(1) *Freake* v. *Horsely*, 2 Freeman, 180; S. C. 2 Eq. Ca. Ab. 77. The heirs of the mortgagee exhibited a bill to have the mortgagor redeem or else be foreclosed. The defendant demurred, because the executor who might have title to the money was not a party; and the demurrer was allowed.

(2) *Palmer* v. *Carlisle*, 1 Sim. & Stu. 423.

(3) *Wood* v. *Williams*, 4 Mad. Rep. 186.

(4) *Duncombe* v. *Hansley*, 3 P. Wms. 333, n.; *Bradshaw* v. *Outram*, 13 Vesey, 234.

the mortgagor in the collateral security should be made a party.(1)

A purchaser under a statute foreclosure may file a bill to foreclose the equity of redemption of a judgment creditor or subsequent mortgagee, and is not bound to make the mortgagor, or any person whose equity is already barred, a party to the suit.(2)

3 Improvements and amount.

The proceedings to a hearing are the same as in ordinary cases. For the form of a decree, see Appendix, No. 264.

Where a purchaser under a statute foreclosure makes valuable and permanent improvements upon the premises in ignorance of the existence of incumbrances, and then files a bill of strict foreclosure, he shall be allowed the value of such improvements by any one seeking to redeem.

And no redemption will be permitted, where there has been a sale under a statute foreclosure, except upon the terms of paying the whole amount due upon the bond and mortgage without regard to the amount of the bid.(3) In the case cited the purchaser was also the owner of the whole mortgage debt by assignment. The chancellor observed that if a third person had been the owner of the residue of the mortgage debt, there might be some equitable claims to be settled between him and the purchaser as to the distribution of the mortgage money. Hence such a person must be made a party to the suit.(4)

4 Infant.

An infant is to be foreclosed with the usual clause giving him a day to show cause after he comes of age.(5) Our statutory provisions do not extend to this case.

The infant cannot ravel into the account, nor redeem; he may only show error in the decree. This was clearly laid down by the Lord Chancellor, as agreeable to the constant practice.(6) I presume that as to the amount, the infant has the ordinary right of surcharging and falsifying. See *Badham* v. *Odell*, 4 Br. P. C. 349.

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(1) *Stokes* v. *Clendon*, 3 Swanston, 150.

(2) *Benedict* v. *Gilman*, 4 Paige, 60.

(3) *Benedict* v. *Gilman*, 4 Paige, 60.

(4) Ibid. See also *Palmer* v. *Carlisle*, before cited.

(5) *Booth* v. *Rich*, 1 Vernon, 295; *Mallack* v. *Galton*, 3 P. Wms. 352.

(6) Ibid. In *Lyne* v. *Willis*, Rolls 1730, this was admitted by counsel on both sides and by the court, to be the settled practice. 2 Eq. Ab. p. 11, pl. 16.

But where the equity of redemption comes to a married woman, she may be absolutely foreclosed, and shall have no day given to her or her heirs, to redeem after the coverture is determined.(1)

If a receiver is appointed on the application of a mortgagee, he may be authorized to keep down the interest upon such incumbrances as are admitted to be liens according to their priority.(2)

The court will not appoint a receiver upon a mortgagee in possession, if he swears that any thing is due to him.(3)

5 Account before the master.

In the author's former work, (Office, &c., of Masters in Chancery, p. 241,) the leading rules of the court are stated upon taking the account on a redemption bill. These are applicable in general to a bill of foreclosure. These rules relate to an allowance for improvements, interest upon such allowance, annual rests to reduce the principal, advances for impositions, the stopping of interest by a tender, &c. I have met with the following decisions since that publication upon several of these points.

Where a mortgagee was in possession, and the interest had never been in arrear, and the rents exceeded the interest, annual rests where ordered that the excess might be applied to the principal. It was said that the court sometimes relaxes the rule where the interest is in arrear when the mortgagee takes possession.(4)

As to allowing for improvements, see *Benedict* v. *Gilman*, before cited, (ante, p. 151.)

In a case in Massachussetts,(5) it was held that a mortgagee should be allowed for repairs but not for improvements. And in another case he was not allowed the cost of an aqueduct, it not appearing but that the premises could be supplied with water without it.

Insurance.

The decisions are that the mortgagee cannot be allowed for

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(1) *Mallack* v. *Galton*, 3 P. Wms. 352.

(2) Seaton's Decrees, p. 130; Smith's Practice, Vol. I. p. 537; *Griffin* v. *Platt*, in Chancery, V. C. May, 1838.

(3) *Rowe* v. *Wood*, 2 Jac. & Walk. 557.

(4) *Shepherd* v. *Elliott*, 4 Mad. R. 254.

(5) *Russell* v. *Blake*, 2 Pick. 505.

a premium of insurance, unless there is an agreement to that effect.(1)

Rents.

If the mortgagee is in virtual possession of the premises by taking the rents, he must account for what he has received, or might have received, without his wilful default, or with ordinary care and diligence.(2)

If he has gone into possession personally, he shall be charged with an occupation rent.(3) This is fixed at the full value,(4) and Lord Redesdale has held that an agreement between mortgagee and mortgagor fixing a rent, was not to be supported.(5) At least in favor of others, it would not prevent an inquiry.

Where, upon taking possession, the premises were in so ruinous a condition that no rent could have been obtained for them, and repairs to buildings had been allowed by the court on the ground of necessity, and that they were substitutions only for the former, the court charged the mortgagee with an occupation rent, only from the time of the repairs being completed.(6)

As to rents accrued before a mortgagee takes possession actually or by notice to the tenants to pay to him, it is fully settled that he cannot recover them against the mortgagor.(7)

If a mortgagee in possession pays rents to the mortgagor after notice of a second mortgage, he will be compelled to repay them.(8)

6 Proceedings on report.

It will be noticed that by the terms of the English order of reference, the master is to appoint a time and place at which the amount is to be paid. The master fixes this in his report

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(1) *Faure* v. *Winans*, Hopkins' Rep. 263; *Saunders* v. *Frost*, 5 Pickering.

(2) *Bulstode* v. *Bradley*, 3 Atk. 582; *Rowe* v. *Wood*, 2 Jac. & Walk. 556; *Burnet* v. *Claghry*, in Chancery, January, 1821, Office, &c., Masters in Chancery, 242; *Webber* v. *Hunt*, 1 Mad. Rep. 13; *Moore* v. *Aylett*, 1 Hen. &. Mumf. 29; *Williams* v. *Price*, cited 3 Powell on Mortgages, p. 949, a.

(3) *Knowles* v. *Chapman*, at the Rolls 1815, Seaton's Forms, 149; *Marshall* v. *Cave*, cited post.

(4) *Marony* v. *O'Dea*, 1 B. & B. 118; *Trimleston* v. *Hamill*, Ibid. 385.

(5) *Webb* v. *Rooke*, 2 Sch. & Lef. 661.

(6) *Marshall* v. *Cave*, 1824, cited 3 Powell on Mortgages, 957, a.

(7) *Coleman* v. *St. Albans*, 3 Vesey, 32; *Drummond* v. *Same*, 5 Vesey, 438; *Mead* v. *Lord Orrery*, 3 Atk. 244; *Thomas* v. *Brigstocke*, 4 Russell, 64.

(8) *Barney* v. *Sewell*, 1 Jac. & Walk. 650.

of the amount due. That amount is computed to a day six months after the date of the report.(1)

A power of attorney is then usually given to receive the amount, and if not paid, an affidavit is made of the attendance and default, and the court will then, on a motion, of course make an order that the defendant redeem absolutely.(2)

It was once held that if the money was not paid by the time appointed by the master, the mortgagor was absolutely foreclosed. But now upon the default, a further order is necessary.(3)

The English court extends the time for this payment of the money, very indulgently. The case of *Edwards* v. *Cunliffe*, 1 Mad. Rep. 287, is a leading authority upon this point. See also, Office, &c., Masters in Chancery, 219.

In the exchequer however, the enlargement of the time is not a matter of course.(4) And Lord Eldon has expressed his regret that the court has so far varied the agreement of the parties. (*Reynolds* v. *Pitt*, 19 Vesey, 140.) In Ireland and Scotland this rule does not exist; on this account money is in these counties more frequently lent on bond and mortgage than in England. 3 Powell on Mortgages, 999, n.

If exceptions are taken to the report, the time will be enlarged until they are disposed of, and this although the time has expired.(5)

In the case of *Wilkes* v. *Wells*, in Chancery, January, 1834, counsel varied in some particulars from the English course. The defendant was an alleged lunatic, and a guardian *ad litem* had been duly appointed. The cause being brought to a hearing, a decretal order was made referring it to a master to report the amount due to the complainant for taxes and assessments paid by him, and also the amount due upon the bond and mortgage, dated the —— day of —— mentioned in the bill of complaint, with an account of rents and profits; that the complainant's costs be taxed, and specified in the report. And if the amount was paid within six months after service of a copy of the report

(1) See the form, 2 Harr. Pr. 162.
(2) Ibid. and Seaton on Decrees 143.
(3) *Sheriff* v. *Sparks*, 1 West, 130.
(4) *Quarles* v. *Knight*, 8 Price, 630.
(5) *Renvoize* v. *Cooper*, 1 S. & S. 365.

and of the decree upon the guardian, that the complainant execute a proper conveyance of the premises, and cancel and satisfy the mortgage of record, &c.(1) See the decree, Appendix, No. 264.

After the report had been made and confirmed, an affidavit of service and of the default in paying the amount was made, and on motion of course an order was made making the foreclosure absolute. See Appendix, No. 265.

The case of *Benedict* v. *Gilman*, (4 Paige, 58,) may perhaps furnish a guide for the practice in most cases. By the decree in that case, the defendants were to elect to redeem within thirty days after service of a copy of the decree, and serve a written notice thereof upon the solicitor of the complainant. If such election was made, a reference was ordered to ascertain the amount due upon the principles declared in the decree. But if such election was not made, they were to be strictly foreclosed. See Appendix, No. 264.

By the adoption of this course a reference need never be had except such an election is made. But I presume an affidavit should be made of the omission to elect, upon which the court should be applied to for a final order to make the foreclosure absolute. It was before observed that in England a foreclosure is to perfect without such order. For the form of such an order, see Appendix, No. 265.

If an election is made, the master's report should be brought on in the usual manner, and then the court will fix, in the decree upon that report, the time for the payment of the money, and insert the usual clause barring a redemption, unless the money is paid. It would be proper, or at least prudent, in such a case, to apply for a final order making the foreclosure absolute, as was done in *Wilkes* v. *Wells*, before referred to. Appendix, No. 265.

7 Possession.

Upon a bill of foreclosure the plaintiff not being in possession, it is stated to be the rule, that the court will not put him in possession, but leaves him to an ejectment. On a bill for a redemption it is otherwise. And the position as to one of foreclosure may perhaps be questioned.(2)

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(1) It will be seen by the bill of complaint, Appendix, No. 263, that a master's deed had been executed in this case.

(2) *Sutton* v. *Stone*, 2 Atk. 101. Mr. Justice Wright merely says—

8 Conveyances.

Notwithstanding the great difference between the doctrine of our courts of law and that of England, as to the estate of the mortgagee, I presume that the English chancery rule as to the necessity of a conveyance is not affected. Upon a foreclosure, a conveyance by the mortgagor is not necessary, unless where the title to the mortgage is defective, or the estate or interest intended to pass by it has not passed. In such cases, if the mortgagor has the power of curing the defect, he will be decreed to make the best title he can. See the cases in Powell on Mortgages, Vol. III, p. 965, n. F, and p. 988; also, *Pye* v. *Daubus*, 3 Bro. C. C., 598.

SECTION III.

BILL FOR REDEMPTION OF A MORTGAGE.

It would be difficult to define with accuracy the persons in whom a right to redeem a mortgage exists. Perhaps it is not too broad a position to assert, that every one who has a legal estate, or recorded lien, in and upon the premises, or who has any equitable interest in them, has this privilege.(1)

"A mortgagee who is not in possession, may bring his bill against a mortgagor before admittance for a decree of foreclosure, and after he has obtained such a decree, may bring his ejectment for the possession of the mortgaged premises." But in *Yates* v. *Hambly*, 2 Atk. 360, upon a redemption bill, Lord Hardwicke held that the party was not obliged to resort to ejectment, but should have a decree for possession here. To the same point is *Miller* v. *Beatty*, cited by Mr. Seaton, (on Decrees, p. 147.) But it appears to me, that the doctrine of the court in *Kershaw* v. *Thomson*, 4 Johns. Ch. Rep., 409, sanctions a decree for possession and a writ of assistance.

If the provision of the Revised Statutes, (2 R. S., 312, § 57,) prohibiting the action of ejectment to a mortgagee, extends to the case of an absolute foreclosure, it would seem that the court must necessarily have the power to give possession by its ordinary process. See also 2 R. S., p. 191, § 158; and as to the mortgagee acquiring a new estate, and being a purchaser after the final order of foreclosure, see *Thomas* v. *Grant*, 4 Mad. Rep. 438.

(1) The right is in the mortgagor and all claiming under him; the

An owner of part of an estate in mortgage, cannot separately redeem his part. The mortgagee is entitled to insist that the whole of the mortgaged premises shall be redeemed together; and for this purpose that all the persons interested in the several parts of the estate as mortgagors, should be made parties to the bill.(1)

The assignee of a partial interest in a mortgage, or the purchaser of a part of the mortgaged premises, may file a bill to redeem, but he must pay off the whole debt. He cannot apportion it, and redeem the premises to the amount only of his interest.(2)

If a second mortgagee bring a bill to redeem the first mortgage, he should make the mortgagor, or, if dead, his heir, a party, though it is not necessary to have his personal representative a party.

The natural decree is, that the second mortgagee should redeem the first mortgagee, and that the mortgagor should redeem him, or stand foreclosed. It must therefore be necessary to have the real representative of the mortgagor before the court.(3)

And the heir of the mortgagor must be made a party in such a case, although the second mortgage is only of part

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ground being an interest in, or a lien on land. It belongs to a volunteer; to the tenant of a mortgagor; to judgment creditors; tenants by elegit, statute merchant or staple in England; to the guardian of an infant, or committee of a lunatic; to the jointress, dowress, or tenant by the curtesy; to subsequent mortgagees. See Powell on Mortgages, Vol. I., 261, *et passim.*

In general, the party seeking to redeem should have a legal title. But the right of an equitable incumbrance is also recognised; for example, if a man on his marriage, article that certain lands be settled on his wife for life with remainders over, and afterwards mortgages the same premises to one who has no notice of the articles, and dies, his widow, who has an equitable estate for life, will be entitled to redeem. She is in equity a purchaser under the articles.(1)

(1) S. T. Plumer, in *Cholmondely* v. *Clinton* 2 Jac. & W. 189.

(2) *Palk* v. *Clinton*, 12 Vesey, 48; *Calkins* v. *Munsell*, 2 Root's Rep. 333.

(3) Lord Thurlow, in *Tell* v. *Brown*, 2 Br. C. R., 278.

(1) *Haymer* v. *Haymer*, 2 Ventris, 343. See also *Spregg* v. *Binkes*, 5 Vesey, 587. *Ehers* v. *Mills*, 13 Vesey, 114.

of the estates comprised in the first, and under a different title.(1)

If a bill to redeem is brought by a devisee, the heir need not be made a party unless the devisee seek to have the will established.(2)

It necessarily results from the doctrine of the English courts, respecting the legal estate being in a mortgagee, that the mortgagee, his heir, devisee, or purchaser under him, must be a party to a bill to redeem. The person having the legal estate must be before the court, otherwise the mortgagor cannot have a complete re-conveyance.(3)

But the personal representative of the mortgagee must also be before the court.. He is to receive the money.(4)

If the mortgage is of a leasehold only, the personal representative of the mortgagee is the only necessary party to the bill.(5)

Although it may not be necessary to have a re-conveyance, because the acknowledgment of satisfaction of the mortgage by the personal representative may be sufficient even after forfeiture and entry, and the legal estate be perfect, yet in general a redemption only is sought where the party is in possession, and in such a case, the possession is usually in the heir or devisee, who should be brought before the court for obtaining possession, if for no other purpose. A release will be decreed if deemed requisite.

Where a mortgagee in possession gives an absolute lease of the premises reserving rent, he or his assigns must be made

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(1) *Palk* v. *Lord Clinton*, 12 Vesey, 48. In *Clark* v. *Long*, 4 Randolph's Rep., 451, it was held that where a purchaser of the equity of redemption brought a bill to redeem, the mortgagor must be a party.

(2) *Lewis* v. *Naugle*, 2 Vesey, sen., 431.

(3) *Wood* v. *Williams*, E., 1819, 2 Mad. Pr., 191; *Lake* v. *Thomas*, 3 Vesey, 17.

(4) Anon., 2 Freeman, 62. A bill was brought against the heir of the mortgagee to redeem, and neither the executor nor administrator were made parties: and the court would not proceed with the cause; for if it should fall out upon the account that money should be paid by the mortgagor, it is to be paid to the executor or administrator, and not to the heir; and so the account ought not to be controverted without their privity. 1 Powell, 402, n.

(5) *Ryan* v. *Morgan*, 2 Molloy, 521.

parties to a bill against the lessee for redemption; so that the lessee may be discharged from his covenants for the payment of rent, and may also have a decree for his proportion of the redemption money, to the extent of the value of his term over and above the rent reserved.(1)

Before a judgment creditor can file a bill to redeem a mortgage of leasehold estate, he must take out an execution.(2) See the form of a bill, Appendix, No. 266.

The cause is proceeded with as in ordinary cases. The decree, if the bill is sustained, is for a reference to ascertain the amount due, and directing the payment within a certain time; the surrender of the premises, delivery of deeds, &c.; and in case of default by the plaintiff in making such payment that the bill be dismissed. See Appendix, No. 267.

The subject of allowances to the mortgagee, and other points arising upon the reference to the master, has been largely treated of in the author's former work, Office &c. of Masters in Chancery, p. 241, and ante, p. 152. I would refer also to a collection of authorities in Seaton's Decrees, p. 151, &c.

No further time is allowed upon a decree for redemption for the payment of the money reported due, than what is fixed in the decree.(3)

Possession as before observed will be ordered by this court, and its process employed to obtain it.(4)

The master having made his report, and it being confirmed, if the money is not paid, an affidavit of the default should be made, and a final order for the dismissal of the bill may be moved for as of course.(5) See Appendix, No. 268.

The final dismission of a bill for redemption is equivalent to a decree for a foreclosure.(6)

As to the costs upon such a bill, see title Costs.

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(1) *Dias* v. *Merle*, 4 Paige, 263.

(2) *Shirley* v. *Watts*, 3 Atk. 200.

(3) *Novoseilski* v. *Wakefield*, 17 Vesey, 417.

(4) *Yates* v. *Hambly*, 2 Atk. 360; and Seaton's Forms of Decrees, 147; Appendix, 2.

(5) *Stuart* v. *Worrall*, 1 Br. C. R. 581. The order in this cause is stated at length in Seaton's Forms of Decrees, p. 147; *McDonough* v. *Shewbridge*, 2 Ball & Beatty, 564.

(6) *Cholmley* v. *Oxford*, 2 Atk. 267; *Bishop of Winchester* v. *Paine*, 11 Vesey, 199.

CHAPTER 31.

PARTITION.(a)

1
Origin of jurisdiction.

THE court of chancery had not an original jurisdiction in partition. Different opinions have been entertained respecting the source of its authority.(1) But whatever that may have been, it is now fully established in England, and was recognised in our state both before and by the Revised Statutes.

By the statute [2 R. S., 329, § 79,] the court of chancery shall have the same power upon bill or petition filed in that court, to decree partition and sales of lands, tenements and hereditaments, as is therein given to the common law courts in like cases. This court has therefore concurrent jurisdiction, and an objection that a perfect remedy may be obtained at law cannot be sustained.(2)

2
Who may file a bill or petition.

Although a petition is authorized it is very seldom resorted to. When several persons shall hold and be in possession of any lands, tenements or hereditaments as joint tenants, or tenants in common, in which one or more of them shall have estates of inheritance, or for life or lives, or for years, any one or more of such persons being of full age, may file the bill.(3)

I presume that under this clause one who is a tenant in fee, or for life, or for years, may file the bill although the co-tenants have wholly different estates. This could be done before the

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(a) In the whole course of this work, I have found no subject so difficult as this of partition. The lawyer who can conduct successfully to its close a partition suit of moment, without a mistake, must be very vigilant, very studious, and very lucky.

(1) See Allnatt on Partition, p. 77. Law Library, Vol. V. 1832.

(2) *Jenkins* v. *Van Schaack*, 3 Paige, 245.

(3) 2 R. S., 317, § 1.

statute. In *Willis* v. *Slade*, (6 Vesey, 498,) a tenant for life of a moiety, together with his children, entitled to the remainder in tail, filed a bill against the persons entitled to the other moiety; and in *Baring* v. *Nash*, 1 Ves. & Bea. 537, a tenant for a term of years in one-tenth, filed the bill against the absolute owners of the other nine-tenths. Besides the English statute (32 Henry VIII. c. 32,) from which this provision has been taken, is express upon this point. It is well settled that this court will entertain a bill whenever a suit will lie at law.(1)

Where the estates are different, the partition can of course be only commensurate with them.

A mere reversioner cannot file a bill for partition.(2) But he is a necessary party, where the owner of a present interest in an undivided part of the premises has also an interest in an undivided part of the reversion; and also where the bill is by the owners of a particular estate, when some of the other parties have a present interest in fee in the residue of the premises.(3) It will be observed that this latter position is contrary to the case of *Baring* v. *Nash*, 1 Ves. & Bea. 551. But under the statute it appears to me that a reversioner must be a party not merely in this case, but in every other. Compare sections 5, 6 and 7, 15 and 35.

It has been held that it is no objection to a bill that there are parties not in *esse* who may become entitled to an interest in a part of the premises. The limitations are not affected by the partition or sale. They are protected and attach to the individual shares.(4)

By the first section of the act, the parties applying for a partition must be of full age.(5)

3 Plaintiff must be of full age. If all must be so.

It appears to me to be the true construction of this section, that where the bill is by *one*, he must be of full age, and where by more than one, they must all be of full age.

The question has in practice frequently arisen, whether an infant can file such bill either alone or in conjunction with

(1) *Turner* v. *Morgan*, 6 Vesey, 498.
(2) *Striker* v. *Mott*, 2 Paige, 389. (3) Ibid.
(4) *Cheeseman* v. *Thorne*, 1 Edw. Rep. 630. See also 2 R. S., 318, § 7.
(5) 2 R. S., 317.

adult plaintiffs. The 79th section of the act must decide this point. The first section in terms refers only to the proceedings at common law. If the 79th section is the only source of the present authority of the court in partition, there can be no doubt upon the subject. The plaintiff or plaintiffs must be adult.

An infant, however, before the Revised Statutes, might file a bill either alone, or in conjunction with adults, and he might unite with adults even in proceedings at law.(1) It should be noticed, however, that there was no express provision in the old statutes requiring the petitioners to be adults. It was decided expressly that an infant might unite with adults under the old act. But it seems to me that the language of the present act decidedly prohibits it.

Besides, it should be noticed, whether the provisions of the 4th section, as to security to be given for an infant upon partition, would not be evaded by making him a co-plaintiff.

4 Averment of possession.

It is not necessary to aver in the bill that the complainant is in possession of the premises, as that will be presumed from the allegation that the parties are seised in common.(2)

If, however, there had been an actual ouster of the complainant by his co-tenant, or if the land is held adversely, an ejectment may perhaps be necessary to regain the seisin before a suit for partition can be sustained.(3) In such a case the defence should be set up by plea or answer.(4)

The possession of a tenant for years, is the possession of the owners to authorize a bill to be filed.(5)

5 Contents of the bill.

The bill or petition, must particularly describe the premises sought to be divided or sold. It must set forth the right and title of all persons interested therein, so far as the same are known, including the interest of any tenant for years, or for life, by the curtesy, or in dower, and the persons entitled to the reversion, remainder, or inheritance after the termination of any particular estate therein, and every person who by any

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(1) *Lord Brooks* v. *Lord Hertford*, 2 P. Wms. 518; *Wills* v. *Slade*, 6 Vesey, 498; *Sears* v. *Hyer*, 1 Paige, 486, *Johnson* v. *Willey*, 11 Johns. 455.

(2) *Jenkins* v. *Van Schaack*, 3 Paige, 245, and authorities cited.

(3) Ibid. (4) Ibid.

(5) *Woodwith* v. *Campbell*, 5 Paige, 518.

contingency contained in any devise, grant or otherwise, may be or become entitled to any beneficial interest in the premises.(1) If any of such parties, or the share or quantity of their interest are unknown, or uncertain, or contingent, or the ownership of the inheritance shall depend upon an executory devise, or the remainder shall be a contingent remainder, so that such parties cannot be named, the same shall be set forth in such petition.(2)

The complainant must set forth the rights and interests of the defendants as between themselves. If the share or interest of any party is uncertain or contingent, or the ownership of the inheritance in any part of the premises depends upon an executory devise, or the remainder in contingent, so that the parties who may be ultimately entitled cannot be named, the complainant should set forth the nature of such contingent interest.(3)

The bill must also state the several liens or incumbrances upon the premises, so far as the same are known to the complainant.(4)

6 Parties.

Every person having any such interest as aforesaid, whether in possession or otherwise, and every person entitled to dower in such premises, if the same has not been admeasured, may be made parties to such bill.(5)

A party who has only a future contingent interest in the premises, cannot file a bill for a partition. Neither can a mere reversioner.(6) But the reversioner, and every person having or who may become entitled to an interest in the property, may be made parties to the bill or petition.(7)

Creditors.

As to creditors, however, having a lien upon the premises, or any part thereof by judgment, decree, mortgage or otherwise, it shall not be necessary in the first instance to make them parties to the proceedings.(8) If the lien is upon a share only, and partition be made, it attaches upon the divided share as it did

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(1) 2 R. S., 329, § 80, and 318, § 5. *Larkin* v. *Mann*, 2 Paige, 28.
(2) 2 R. S., 318, § 7.
(3) *Van Cortlandt* v. *Beekman*, June 20, 1837; MSS. Chancellor Walworth.
(4) Rule 174.
(5) 2 R. S., 318, § 6.
(6) *Striker* v. *Mott*, 2 Paige, 587.
(7) 2 R. S., 318, § 6.
(8) 2 R. S., 318, § 8, and Laws, 1830, p. 396.

upon the undivided interest.(1) But the parties presenting the bill, may at their election, make every creditor having a *specific lien* on the undivided interest or estate of any of the parties, by mortgage, devise or otherwise, a party to the proceedings.(2)

It will be perceived that the 174th rule is not altered in the late edition of the Rules, (1837,) and the provision of section 5, sub. 2, [2 R. S., 318,] is still in force. It seems to me, therefore, that the bill should set forth the several specific liens and incumbrances upon the premises, even if the creditors by virtue of them, are not made parties. But as to general liens, such as judgment or decrees, there is a difference where the lien is upon the whole premises or upon a share only.

Where it is plain that a sale will be ordered, the practice within my experience is to make a judgment creditor upon the whole property a party to the suit. But not to make judgment creditors upon a share only such parties.

While the 8th section (Laws 1830, 396,) provides that it shall not be necessary to make such a creditor upon the whole, or one having a lien upon a part only, a party, it implies he *may* be made such. And the last clause of the 178th rule, implies the same thing, independent of general principles. The master, by that rule, is, if required, to ascertain the amount due to any creditor not a party to the suit, which is either a specific or a general lien upon all the shares of the parties in the premises.

And it is equally the practice to make a creditor upon the whole premises by specific lien, such as a mortgage, a party to the bill. The right to do this is implied in the 8th section, (Laws, 1830, 396,) and in the 178th rule. If required by the parties, the master is to ascertain the existence of such a lien. But suppose the party holding it refuses to attend upon a summons, not being a party to the suit, would the amount reported due be binding upon him? And could the purchaser pay his money, and allow it to be disbursed according to that report with safety?

The new section, in the act of 1830, (page 397, § 45,) provides that no creditor, having a specific lien on an undivided share, shall be affected by the sale or conveyance, unless he shall have

(1) 2 R. S., 318, § 9.

(2) Laws, 1830, p. 396, § 10.

been made a party to the proceedings. Certainly the same must be the rule with respect to creditors upon the whole premises. These views apply equally to the case where the lien, be it general or specific, affects the whole interests of the parties in one parcel of the property, as where it affects the whole property in question.(1)

But as to general creditors by judgment, &c., upon undivided shares—if the property is to be sold, the advertisement by the master under the 43d section, (Laws 1830, 397,) hereafter adverted to, is equivalent to their being made parties. And if a partition is to be made, the lien will attach upon the divided share.

The result of my examination of this subject is, 1st. That where a sale is anticipated, creditors, whether general (as by judgment or decree,) or specific, (as by mortgage,) whose lien extends to the whole premises, or to the whole estate and right in a portion of the premises, should be made parties to the bill. I do not suppose a bill demurrable without it, but that it is expedient and justifiable to make them parties.

2d. That creditors by specific lien upon an undivided interest in the premises should also be made parties to the bill. If not made parties originally, and the master reports that a sale is necessary, then the bill must be amended, and such creditors brought in as parties.(2)

3d. That judgment creditors upon an undivided share, ought not to be made parties to the suit.

Wife and widow.

A partition made on the application of a wife without her husband, would not only be void as to him, but as to her also, as she cannot sue in her own name except by her next friend.(3)

The statute directs that the rights of all persons interested in the premises by curtesy or dower, are to be set forth in the bill or petition; and every person entitled to dower, if it has

(1) Before the statute, it was decided that neither a mortgagee upon the whole, nor upon a part, was a proper party to the bill. *Wetton* v. *Copeland*, 7 Johns. C. R., 140; *Sebring* v. *Mersereau*, 1 Hopk. 501. Unquestionably the present statutes have altered this rule.

(2) It seems to me that is indispensable under the 42d and 45th sections. (Laws 1830, 397.)

(3) *Crowther* v. *Crowther*, in Chancery, April 18, 1837. MSS. Chancellor Walworth.

not been admeasured, may be made a party. (2 R. S., 318, § 5, 6.)

As to a widow, therefore, she should be made a party, and although the statute is only permissive, yet it is best to make her a party in all cases, but particularly so if a sale will probably be directed. (See section 51.)

But as to a wife with only an inchoate right of dower, the question has until lately been very unsettled. It has received, in a late case, a very full examination from the chancellor, who decided that the wife, even if an infant, could be bound by the decree. The case is appealed to the court of errors. I give the opinion much at length, both as it is the present law of the court, and that the rules and principles stated in it would be found of great use, even if the point is decided otherwise.(1)

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(1) *Jackson* v. *Edwards*, in Chancery, January 28th, 1839. The Chancellor.—It remains for me to consider the objection to the title arising from the fact that the wife of the complainant, Henry Jackson, and the infant wife of D. S. Jackson, one of the defendants, had inchoate rights of dower in the undivided shares of the premises belonging to their husbands respectively; and which the vice-chancellor supposes could not be divested by a sale under the decree, so as to protect the purchasers against the dower of these *femes covert*, should they survive their husbands.

The power of this court to transfer the legal titles of infants and others, who are made parties to a suit in partition by a simple conveyance by the master upon a sale by him under the decree, does not depend upon the general powers of this court to transfer the legal title to real estate by a simple decree for a sale thereof by a master; but it depends upon the true construction of our several statutory provisions relative to the partition of lands. Independent of any statutory provisions and of the powers of this court, the ordinary mode in which courts of equity transferred the legal title upon a sale under a decree, was by operating upon the parties themselves, and compelling them to join in the conveyance to the purchaser, so as to transfer their legal titles in connection with the equitable interests of any of the other parties; which equitable interests would be bound by the decree by estoppel, and would pass by the master's deed without any formal conveyance by the party having an equitable interest only. Thus where the legal estate was in the hands of trustees, and a decree for a sale thereof to satisfy the objects of the trust, or any lien or incumbrance upon the property, the trustees were usually required by the decree to join with the master in his conveyance on the sale; and that was deemed sufficient to protect the rights of the purchaser, both in law and equity, against the claims of the *cestuis que trust*, who were either parties to the suit, or who were bound by the decree as privies. But independent of any statutory provisions, this court was not

By the 80th section, guardians for minors are to be appointed,

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Regulation of course of proceedings.

wanting in power to make a decree which would protect the purchaser at the master's sale, where all parties having a legal or equitable title to the land, which was capable of being released or transferred to the purchaser, were made parties, and where they were within the jurisdiction of the court, so that its process could be made effectual against them, although the parties having the legal title or interest in the land were infants or *femes covert*. In the case of a *feme covert* the court compelled her to join with her husband in a transfer of her legal interest to the purchaser by a fine or other formal act, which would have the legal effect to extinguish or transfer such interest; and in case of an infant, although the court had not the power to decree a conveyance from him which would operate as an immediate transfer of his legal estate, the court was authorized to do that which was substantially the same thing, so far as the interest of the purchaser was concerned; that is, to decree conveyance by the infant upon his attaining twenty-one, unless within six months after he should attain that age, he should show cause to the contrary; and that in the mean time the purchaser hold and enjoy the estate, (*Blatch* v. *Wilder*, 1 West's Rep. 324; 1 Atk. 421, S. C.) and the purchaser who buys the estate under such a decree, must accept the order of the court for a future conveyance by the infant as a sufficient security for his title. (*Powell* v. *Powell*, Mad. & Geld. Rep. 53.) The court will protect the purchaser by injunction, against the infant, or those claiming under him, in the enjoyment of the estate until the legal title shall be actually transferred according to the directions of the decree. The court in such a case also so far protects the purchaser under the decree, that it will not permit the infant when he becomes of age to impeach the title for mere error in the decree. (*Bennett* v. *Hamill*, 2 Sch. & Lef. 566; 1 Daniel's Ch. Pr. 228.) If it were necessary therefore to resort to the common law powers of this court to make a sale under a decree in partition valid and effectual against the inchoate rights of dower of the wives of some of the tenants in common, it will be seen that the means are generally within the reach of the court if it thinks proper to employ them.

Upon a careful examination, however, of the several provisions of the Revised Statutes, relative to the partition of land in connection with the former legislation on the same subject, I have arrived at the conclusion, that a sale by the commissioners in partition under the judgment of a court of law, or by a master in chancery under a decree of this court, will of itself be sufficient, without any act of hers to bar or extinguish the contingent right or interest of the wife of one of the tenants in common in the land, where she is made a party to the suit with her husband; whether she is an infant or an adult. The six last sections of the revised act of 1813, for the partition of lands (1 R. L., 513,) contained new provisions which were intended to remedy defects in the previous law on that subject, and to reach the various estates and interests of all persons in the several undivided shares of the premises held in common, and in

the same rules as to parties shall apply, and *the like proceedings*

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which premises some of the parties to the suit had a present estate as a tenant in common for life, either as a tenant by the eurtesy or in dower or otherwise; so as to make the partition, or a sale under the judgment or decree, valid and binding, as to every estate or interest in an undivided share of the premises, whether present or future, vested or contingent. This act however was found defective in two particulars: 1st, That it did not authorize a widow who had a present right of dower in the whole premises to be made a party to the proceedings, although that dower still remained unassigned; and, 2d, That no provision was made for making creditors who had liens upon some of the shares of the tenants in common parties to the proceedings, or for the payment of their debts out of the proceeds of the shares on which such debts were a lien. The revisers therefore provided for these two defects in the new provisions which they introduced into the Revised Statutes on this subject; retaining substantially all the previous provisions of the act of 1813 and the act of 1814, amending the same, in relation to the barring of other future and contingent interests by a sale of the premises under the judgment or decree. That it was the intention of the revisers to enable the courts to give a purchaser under the judgment or decree, when a sale of the premises was found to be necessary, a perfect title as against every future or contingent interest in any undivided share of the property, is evident from the note which they appended to the new provisions introduced by them in relation to incumbrances on such shares. Indeed without such a power it would be very difficult to make the partition equal in the case of a sale, as a contingent right of dower or other defect in the title, as to one share in the property must upon a sale necessarily diminish the amount bid for all of the shares collectively. The same difficulty therefore would exist in determining the value of a wife's inchoate right of dower, in the undivided share of her husband, for the purpose of dividing the proceeds of the sale among the different tenants in common according to equity, as is apprehended by the counsel to exist in making a suitable provision for this contingent right in the wife out of the whole of the proceeds of her husband's share of the sale, if she choose to insist upon her right to such a provision, and in addition to that, the fact that the title in the hands of the purchaser would be incumbered with a contingent right of dower of a *feme covert* in an undivided share of the premises which might subject the owner to future expense and litigation, would diminish the value of the property in the hands of the purchaser to more than double the actual value of such a contingent right. I cannot believe that the legislature intended to leave this contingent interest or inchoate right of dower of the wife of a tenant in common, an incumbrance upon the title in the hands of a purchaser, any more than that it was intended that a similar contingent interest of the husband in the wife's property should remain an incumbrance thereon. Although the husband has a present interest in his wife's real estate from the time of the marriage for the

are to be had upon a bill in this court, as are directed by the

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joint lives of himself and wife, he is not even a tenant by the curtesy inchoate so as to give him an estate for his own life in the premises, until the birth of issue. And I believe that it has never been doubted that a sale in a partition suit to which he was a party, either under the act of 1813 or under the provisions of the Revised Statutes, would have the effect not only to divest his present estate in the property during the joint lives of both, but also to bar his contingent interest in the property for the remainder of his life after the death of his wife, in case he should afterwards have issue and should survive her. Yet I have not been able to find any provision in the Revised Statutes which can reach such a case which is not equally applicable to the wife's inchoate right of dower in the husband's estate. The provision of the statute referred to by the vice-chancellor, relative to estates for life in curtesy, or dower, (2 R. S., 325, § 50 to 55,) do not in terms cover either of the cases above referred to. And if in either case there should be such a disagreement between the husband and the wife as to render it necessary for the court in providing for the legal rights of each to settle their proportions of the proceeds of the sale, and if there was no other way to protect their rights than to ascertain the present value of the contingent interest of the husband or wife in such proceeds, it would be much easier to ascertain the present value of the wife's contingent right of dower, than to ascertain the value of the husband's chance of becoming a tenant by the curtesy, not only by surviving his wife, but also by becoming the father of a child by her. Indeed the annuity tables have furnished the court with the means of ascertaining the probable value of the wife's contingent right of dower during the life of the husband. These tables show the value of annuities depending not only upon the continuance of single lives of different ages, but upon the continuance of two or more joint lives. And the proper rule for computing the present value of the wife's contingent right of dower during the life of the husband, is to ascertain the present value of an annuity for her life equal to the interest in the third of the proceeds of the estate to which her contingent right of dower attaches, and then to deduct from the present value of the annuity for her life, the value of a similar annuity depending upon the joint lives of herself and her husband. The difference between these two sums will be the present value of her contingent right of dower. Should it be necessary in the case of an infant or adult wife, for the court to protect her contingent right of dower upon a sale under a decree in partition, where the value of the husband's undivided share of the estate was such as to render it proper, the present value of that contingent right may be ascertained in this manner. And the amount may be invested in the trust company or a saving's bank, in the name of the register, to accumulate for her benefit during the joint lives of herself and her husband. So that the whole accumulated fund may then be paid over to her, or her personal representative at that time, in full of her share in the proceeds of the sale. Her

statute as to proceedings in the common law courts, except as

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right may also be effectually protected by directing the whole proceeds of the husband's share to be paid over to him upon his giving security to the register or clerk, that the interest or income of one third of such proceeds shall be paid to his wife after his death, if she survives him, during the term of her natural life.

Although the Revised Statutes have given specific directions as to the mode of ascertaining and securing the shares of the proceeds belonging to tenants in dower, and by the curtesy, and other tenants for life, having present estates in possession in the premises, there is still a large class of future estates, both vested and contingent, in the lands which are to be sold under judgments and decrees in partition, that are not embraced in those specific directions. In all such cases, it will be the duty of the court, to ascertain and settle the value of such future estates and interests, upon just and equitable principles, and to make such order as may be necessary for the protection of the shares of the fund which may belong to the persons who then are or may thereafter be the owners of such future estates or interests, in analogy to the express provisions of the statute relative to the shares of parties, who have present estates for life, in possession. I cannot therefore concur in the opinion of the vice-chancellor, that the neglect of the legislature to make a specific provision for the ascertainment of the value of the wife's contingent right of dower, and to secure the same for her benefit, is any evidence that it was intended to leave that or any other future or contingent interest of a party to the suit as an incumbrance upon the title of a purchaser, under the judgment or decree.

To show that it must have been the intention of the legislature to bar all such future and contingent rights by the sale, so as to give perfect title to the purchaser, I will refer to some of the provisions of the Revised Statutes on the subject. It may be proper, in the first place, however, in answer to a suggestion of the counsel for the appellants, to remark, that whatever estates or interests in the premises, may be directed by a sale in partition, under the judgment of a court of law, will also be directed by the conveyance of the master under a decree of this court: the jurisdiction and powers of courts of law, and of this court, being concurrent, so far at least as concerns the legal title to the lands, of which partition is sought by the suit in either court.

The fith section of the title of the Revised Statutes, relative to the partition of lands, (2 R. S., 318,) requires the plaintiff in his petition to set forth the rights and titles of all persons interested in the premises, so far as known to him, including the interest of any tenant for years, for life, by the curtesy or in dower, and the persons entitled to the reversion, remainder or inheritance, after the termination of any particular estate therein, and every person who by any contingency contained in any devise, grant or otherwise, may become entitled to any beneficial interest in the premises. This language is certainly broad enough to include the

in the statute is afterwards provided.(1) The chancellor has said,(2) "that although most of the provisions relate particularly to the proceedings in the common law courts, the same course of practice must be adopted here, so far as those provisions can be carried into effect in the ordinary course of proceeding in this court. If the suit is commenced by bill, the complainant may proceed by subpœna, as in ordinary suits in this court." It is

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contingent right of dower of the wife of one of the tenants in common, as well as other future or contingent interests. And the next section authorizes every person, having such an interest, as is mentioned in the 5th section, whether the same is in possession or otherwise, and every person entitled to dower in such premises, if the same has not been admeasured, to be made a party to the suit. The special provision in relation to dower was inserted in this section, to reach the case of a doweress, who was entitled to an estate, as tenant in dower in the whole premises, as the supreme court has decided that the provisions of the Revised Laws of 1813, did not reach the case of a doweress, whose husband was not a tenant in common of an undivided share of the estate. (See *Cole* v. *Coles*, 15 Johns. Rep. 319.) The language of the 7th, 10th, 11th, 12th, and 13th sections of this title as originally passed, are equally comprehensive with the 5th, and show that it was the intention of the revisers and of the legislature, that the owner of every future and contingent interest, whether known or unknown, as well as the owners of present interests, should be made parties to the suit, and that their several rights and interests should be ascertained and settled by the court, before a judgment or decree for a partition or a sale of the premises should be made. By the 61st section, the conveyance which is directed to be executed by the commissioners under a judgment for the sale of the premises, is declared to be a bar both in law and equity, against all persons interested in the premises in *any way*, who shall have been named as parties in the proceedings, and as against all such persons or parties as were unknown, if notice of the application for partition shall have been given by publication, as directed by the statute, and against all other persons claiming from such parties or either of them. And by the 84th section, the same force and effect is given to a master's deed, under a sale by virtue of a decree of this court. I am therefore compelled to declare that the opinion of the vice-chancellor, as expressed in this cause, and in the case of *Mathews* v. *Mathews*, (1 Edw. Ch. Rep. 565,) as to the effect of a sale in partition, upon the inchoate right of a dower of the wife of a tenant in common, who has been made a party to the suit in conjunction with her husband, is erroneous, and that the purchaser under the judgment or decree will be protected against any future claim on her part both in equity and at law.

(1) 2 R. S., 329, § 82.

(2) *Larkin* v *Mann*, 2 Paige, 28. This opinion was delivered before the act of 1831. Laws 1831, p. 243.

also provided in the former 80th section, that the same notice was to be given, served, and published, as when a petition was presented to a common law court. That made it necessary, under the former 12th now 13th section, to publish the whole bill in the advertisement, where there were unknown or absent parties, unless a copy was served personally on the absent owner. The statute of 1831 [Laws 1831, p. 243,] remedies this inconvenience. It provides that where the suit is instituted by bill, it shall not be necessary to serve a copy thereof, except on the parties who appear, nor any notice of presenting or filing the same, on any of the defendants named in such bill; but the said defendants, or such of them as reside in the state and can be found therein, shall be served with a subpœna to appear and answer the bill, and the same may be taken as confessed, according to the practice of the court.(1)

This section sanctions the usual course of the court upon these bills by subpœna, and the ordinary modes of taking the bill as confessed. The mode of service, mode of obtaining an appearance, order to answer, &c., are therefore authorized.

8 Absent defendants.

The 84th section of the act provides, that if any parties having an interest in the lands, are unknown, or if either of the known parties, whether minors or of full age, reside out of the state, or cannot be found therein, and such facts be made to appear to the court by affidavit, an order may be made by the court containing a sufficient description of the premises, whereof partition is sought, and requiring all parties interested in the same to appear and answer the bill, by a day in the said order to be specified.

This order must be published for three months, once in each week successively, in the state paper, and in a newspaper printed in the county where the premises are situated, if there be any, and if there be none therein, a newspaper, printed in the city of New-York. See the affidavit and order, Appendix, No. 269.

The publication of this order will authorize an order or decree to take the bill as confessed, by all such unknown parties and persons not resident in this state, or not found therein, as shall not appear and answer by the day mentioned in such or-

(1) Laws 1831, p. 243, cap. 200; 2 R. S., 253, § 83, ed. 1836.

der, or on such further day as the court may appoint.

The order to take the bill as confessed against an absent defendant in a partition suit, is an order of course, and may be entered in the office of the register or clerk, upon filing the affidavits of publication, and of the neglect of the defendant to appear and answer.(1)

Such unknown persons as may appear shall be entitled to be made parties to the suit, and the bill may be amended accordingly.

See the order made on the expiration of the publication, Appendix, No. 270.

But with these exceptions, and those in the statute after the 82d section, I apprehend a very strict adherence must be had to the regulations of the act.

If a mode of proceeding is prescribed different from what prevails in our court upon the same point under other bills, the former must be pursued, and the forms adapted to the statutory regulations. Where there is no regulation upon the point, or one consistent with the court's regular practice, the latter will of course prevail.

9 Guardian of Infants.

By the second section of the statute, a mode is provided for appointing guardians *ad litem*, upon the application of a complainant or party applying for partition, and this section, with the laws of 1833, will be afterwards noticed.

It will be observed that under the Revised Statutes, the appointment of a guardian was to be procured previous to the filing of the bill, or perhaps previous to any rule to answer. The statute of 1831, [54 Sess. Cap. 200, Sec. 1st,] has done away with these provisions as to resident infants, and the ordinary course of serving a subpœna, &c. is to be pursued.

Where the infant himself, or one on his behalf, applies, the practice of the court in ordinary cases prevails, with one exception.

The petition must be presented to the court. An order of course cannot be entered under the 146th rule, as in other cases. This is in consequence of the 4th section of the statute, (2 R. S. 317,) being considered applicable to applications by the

(1) *Christy* v. *Christy*, in Chancery, Sept. 20, 1836; MS. Ch. Walworth.

infant, as well as to those by a complainant. The court is to direct the penalty of the bond.

The petition, consent, and affidavit, should be framed and obtained as usual, as to which, see ante, Vol. I, p. 171, and Appendix, No. 66. The certificate of a master, that the proposed guardian has no interest in the suit, in opposition to the infant, and is not connected in business with the solicitor, &c., is not requisite, but there should be an affidavit to that effect. I have usually had such affidavit made by the proposed guardian. See the petition, Appendix, No. 271.

The court, however, has appointed the general guardian, guardian *ad litem*, without the certificate of competency required in other cases.(1)

However, it appears expedient to follow the requisitions of the 146th rule. The character of the guardian in the case cited, probably induced the court to make the exception. Besides, a general guardian, though in other respects presumed proper, may have a hostile interest to that of the infant.

The petition thus prepared, is to be presented to the court, which will then make an order appointing the proposed person guardian, upon his executing a bond as directed. See the form of such order, Appendix, No. 273.

The guardian, before entering upon the execution of his duties, shall execute a bond, in such penalty, and with such surety, as the court shall direct to the people of the state, conditioned for the faithful discharge of the trust committed to him, and to render a just and true account of his guardianship, in all courts and places, when thereunto required.(2)

The chancellor or vice-chancellor has entire discretion in fixing the penalty, and may direct one or more sureties. It is usual to order the sum to be double the amount of the infant's share of the property, but I have known it directed one-third of the value, under peculiar circumstances, as where the property was very large. Indeed, as the 149th rule, and 64th section of the act, prevents the payment of money to the guardian *ad litem*, except for maintenance merely, the object of heavy security does not seem very clear.

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(1) *Clinton* v. *Clinton*, Aug. 5, 1831. See the order, Appendix, No. 272. Judge Spencer was the guardian.

(2) 2 R. S. 311, Sec. 4.

For the form of the bond, see Appendix, No. 274.

The bond must be filed in the office of the clerk, before any order to answer, or any other order, shall be made.(1) The guardian thus appointed, and who shall have given the required bond, shall represent the minor in the proceedings for partition, and his acts in relation thereto, shall be binding upon such minors, and shall be as valid as if done by such minors after having arrived at full age.(2)

But if neither the infant, nor any one in his behalf, apply, the course is prescribed by statute. By the act of 1833, Sess. 56, Cap. 227, it is provided that when a bill shall be filed in a court of chancery, for the partition of any lands, and any of the joint tenants, or tenants in common, who are defendants in such bill, are minors, for whom no suitable or uninterested person shall voluntarily signify his consent in writing to the said court to be appointed guardian by the said court, and offer to give the security required by the Revised Statutes, in cases of partition, it shall be the duty of the court on the petition of the complainants to appoint the register, assistant register, or either of the clerks of the same court, the guardian of such minor or minors, for the purposes of such petition, and to dispense with the security.

A copy of the petition, with a notice specifying the time and place of its presentation, must be served at least ten days before it is presented, upon the general guardian of such minor or minors, in case there be such guardian, or if none, upon the minor himself. Proof of such service must be made to the chancellor or vice-chancellor before whom the bill is filed.

I apprehend, that as to minors residing within the state, this act of 1833 entirely supersedes the second section of the former act. The proceedings under it are plainly pointed out by the statute itself. See the form of the petition and order, Appendix, No. 275.

But where the minors reside abroad, the application of this statute is by no means clear. They are not named therein in terms, and the 2d section of the general act (2 R. S. 317,) expressly provided that the court might appoint a guardian for minors, whether they resided in or out of the state. Besides, the settled course of the court, in other cases is, to advertise

(1) 2 R. S., 317, § 4. (2) Ibid. § 3.

under the statute respecting absent defendants, in the case of minors as well as of adults. While the 2d section, 2 R. S., 317, authorized the court to appoint such guardians for absent infants, it omitted any direction, as to the mode or time of notice, to be given to them. The service therein directed upon the general guardians, undoubtedly means upon the general guardians of those who are within the state.

It left it, therefore, to the discretion of the court whether it would direct *any* notice to be given, either as to time or mode of giving it; and upon this view the appointment of a guardian in *Ogden* v. *Hoffman*, 1830, cited ante, Vol. I. p. 193, was, I presume, made.

The second section appears to contemplate an appointment of a guardian before the actual commencement of the suit. The tenth section looks to the same course of practice, directing service of the petition forty days previous to the term in which the petition is to be presented, upon the guardians of minors appointed as before directed.

The presentation to this court is, however, the application for an order to answer under the 13th section, and no objection can arise to the filing of the bill, and serving subpœnas, before applying for a guardian.

I do not find that the act of 1831, (p. 243,) has repealed these provisions. The first section only removes the necessity of serving a copy of the bill before it is presented or filed; and the last clause of that section directs the service of a subpœna only upon resident defendants who can be found. And as to the second section of that act, it is conformable to the twelfth of the Revised Statutes, (2 R. S. 319,) substituting only the publication of the notice, with a brief description of the premises for that of the bill itself. If, then, the appointment could be made in anticipation for non-resident infants, without publication, under the Revised Statutes, I do not see that the amendment of the twelfth section, by this act, prevents it now.

Upon the whole, it appears to me, that there is much ground to conclude that the court has the power to appoint a guardian for a non-resident infant without advertising for his appearance under the statute of 1831. It is, however, clear, that such a course may be pursued under that act, and this is the practice generally pursued. The second section of that act undoubtedly appears to authorize an order to take the bill as confessed

against absent infants without the appointment of a guardian. But as it is only that the publication shall authorize such an order, there is nothing to prevent the court from adopting its usual course on behalf of infants. Upon the publication being duly made, a guardian should be appointed by the court as in ordinary cases. See ante, Vol. I. p. 193.

If the other course is however allowable, care must be taken to follow the statute, the 2d and 10th sections, minutely. And after the appointment is made, it would be prudent to pursue the directions of the 10th section; to serve the bill on the guardian with a notice that it will be presented on a certain day in term, and application made for an order to answer. This notice must be for forty days.

I think it clear that in such a case security must be given by the guardian. The act of 1833 does not interfere and render the appointment of the register, &c., requisite, because it appears to me that act relates only to resident infants. But to prevent any difficulty on that head, the person proposed to the court should signify his consent in writing to be appointed guardian, and offer to give the security required by the statute.

I cannot think that the generality of the language in the act of 1833, empowers a service upon the general guardian or the minors residing out of the state.

The answer of the infant is in the usual form. In other particulars the duties of the guardian are the same as in ordinary cases.

10 Answer.

The defendants may answer the bill in the usual mode.

If the rights and interests of the several parties are truly stated in the bill or petition, it shall be sufficient for the defendants to put in a general answer, admitting the rights and interests of the parties in the premises to be as stated in the complainant's bill or petition. And no solicitor shall be allowed on the taxation of costs for more than three folios contained in any such answer.(1)

The defendant who answers is bound to answer as to the rights of the several defendants, if they are stated in the bill. He must do this by a general admission of the rights as stated in the bill, or otherwise.(2) A defendant may set up in his

(1) Rule 176.

(2) *Van Cortlandt* v. *Beekman*, in Chancery, 20th June, 1837; MSS. Chancellor Walworth.

answer to a bill for partition a claim that he is entitled in equity to the whole premises of which partition is sought. If he wants a decree to transfer to him the legal title, or if a discovery is necessary for his equitable defence, he should file a cross bill.(1)

11 Amendment to bring in parties.

I apprehend that a party claiming an interest and omitted in the bill, may make himself a party by petition and an affidavit of his interest.(2)

Again, under the 21st section grantees of any of the parties, whether before or after suit, may be brought in as parties. But here it is necessary to consider carefully whether the practice of the court is not changed, by the statute. In such a case usually an amendment would be made, (where the grant, &c., was before bill filed,) and a subpœna would be sued out. But the statute directs that no person shall so be made defendant without forty days' notice of the motion to that effect being personally served on him, or published three months, as in the case of an original application. However, it must be considered whether this case is not within the 1st section of the act of 1831. That provides that the defendants, or such of them as reside in this state, and can be found therein, shall be served with subpœnas to appear and answer the bill, and the same may be taken as confessed according to the practice of the court.

Now an amended bill is the original bill with the alteration. It appears to me that the section does govern the case in question, and then the amendments may be made and subpœnas taken out, as in other cases. And the section seems to me to justify also the ordinary supplemental bill, where the grant, &c., is *pendente lite*. But if that section does not apply, a previous notice of forty days must be given, of the motion to amend the bill by making the grantee a party.

The 85th section also directs that the court may in like man-

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(1) *Gorman* v. *Machin*, in Chancery, MS. Chancellor Walworth.

(2) 2 R. S., 319, § 16. It is provided that if any person having any interest in the premises, be not named as a party in the petition, he may be admitted to appear and answer the same as a defendant by the court, upon his petition accompanied by an affidavit of his interest. The act of 1831 as is subsequently observed in the text, enables a complainant to make such person parties, but there is no other mode I believe by which a party omitted may come in and become a party on his own application.

ner, as before provided, amend the petition or bill, and other pleadings, with the like saving to the parties affected thereby.

It is doubtful whether a woman married, after the bill is filed, to one of the parties, need be made a party to the suit. But if she is brought in, it should be by an order that the further proceedings should be in the name of herself and husband, not by a supplemental bill, much less by amendment.(1)

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(1) *Jackson* v. *Edwards*, in Chancery, January 28th, 1839. Per Chancellor.—The defendant, D. S. Jackson, was not married when the original suit was commenced, and it appears by the papers before me, on these appeals, that notice of the commencement of the suit was duly filed in August, 1835, as required by the statute, and by the rules of this court. It is very doubtful, therefore, whether the wife of this defendant, who was married three months afterwards, would acquire any interest in the property which was the subject of the litigation, by her own voluntary act, *pendente lite*, which would not have been divested by a sale under the decree. But it appears the complainants amended their bill subsequent to the marriage of the defendant, D. S. Jackson, by stating the marriage, and making his wife a formal party as a defendant in the bill, and this, as the counsel for the respondents insist, was a waiver of the former proceedings, and a substantial commencing of the suit *de novo*, subsequent to the marriage. It probably was not necessary for the complainant to take any notice whatever of the marriage of a male defendant, *pendente lite*. But even if it was proper that his wife should be named in the subsequent proceedings, neither a supplemental bill or an amendment of the original bill was necessary to bring her before the court. The proper course would have been, as in the case of the marriage of a female defendant, to obtain an order that the further proceedings in the suit should be in the names of the husband and his wife, as parties. (See Story's Eq. Pl. 289, § 354; Gilbert's Ch. Pr. 174, 178.)

Indeed, as a general rule, a bill cannot be amended for the purpose of stating any new matters which have occurred subsequent to the commencement of the suit; or of bringing a party before the court, whose right or interest in the suit, accrued subsequent to the time of filing the original bill, (1 Daniel's Ch. Pr. 510; 1 Newl. Pr. 279,) and I presume the order of the vice-chancellor, of the 16th of December, 1835, directing that the wife of D. S. Jackson be made a party defendant with her husband, was only intended to conform to the usual practice in making the husband of a female defendant, who has married *pendente lite*, a party with her in all proceedings in the suit, and that the solicitor for the complainants mistook the intent and meaning of that order, if he supposed it required, or even authorized an amendment of the bill, by stating the marriage, which had taken place since the com-

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Proof of title and interests.

If the rights of the several parties are not admitted as stated in the bill, the complainant must make such proof of his title as would be sufficient to enable him to recover in ejectment.(1) Where an issue of fact is joined in the cause, it may be decided in the ordinary way of deciding questions of fact, viz. by taking testimony before the examiner,(2) or the court may award a feigned issue for the trial thereof.(3)

Where the bill has been taken as confessed against all or any of the defendants, the statute directs that the complainant must exhibit proof of his title, and an abstract of the conveyance by which the same is held.(4)

Under this provision of the statute the 177th rule has been framed.

Order of reference for such purpose.

The chancellor states, that where the cause is to be heard on pleadings and proofs, the complainant may make proof of his title before the examiner, and produce it with the abstract of his conveyances, by which it is held, at the hearing.(5) But if the bill has been taken as confessed against all or any of the defendants, this proof may be made, on a reference to a master for that purpose, where the cause is not to be brought to a hear-

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mencement of the suit, and making her a party to the bill itself, instead of a mere party to the further proceedings in the suit, by a formal prayer of process of subpœna against her in such bill. Without stopping, however, to inquire whether the counsel for the purchasers are right in their conclusion as to the effect of this irregular amendment of the bill, upon the rights of a party who would otherwise have stood in the situation of a mere purchaser from a defendant, *pendente lite*, I shall proceed to dispose of the remaining objections to the title to be acquired by the master's deed, under the decree of sale, as if the suit had been actually commenced at the time that amendment to the bill was made.

(1) *Larkin* v. *Mann*, 2 Paige, 28.

(2) I have in this, and in some other instances, adverted to an examination before an examiner, as still the course of the court. It is generally presumed, that the act of 1838, virtually abolishing such practice, and directing issues to be made up, will be repealed. No measure has more signally failed of its object.

(3) 2 Paige, 28. It will be observed, that the 18th section of the statute does not direct that an issue *must* be made for trying facts denied. The court, therefore, is not precluded from pursuing its usual practice.

(4) 2 R. S. 323, § 23.

(5) *Larkin* v. *Mann*, ut supra. This was done in *Hannan* v. *Osborne*, a case of contested title. See 4 Paige, 336.

ing on pleadings and proofs.(1) The act provides that such proof shall be taken in open court, or by the clerk thereof, on a reference for that purpose. We therefore see, that while the court must take proof of the title in case of a default, the formal mode of doing it pointed out in the statute is not obligatory. It may be done by a master who in no sense is a clerk, although the register may be such.(2) It appears to me advisable, however, to file the proofs and abstracts with the register, before whomsoever they may be taken. (See section 22, and rule.)

Where there are answers admitting the whole statements of the bill, as to the rights of the parties, and those answers are by adults, the cause may be brought to hearing in the usual mode, upon bill and answer, without a reference, under the 177th rule. Upon the hearing the court will declare, adjudge and determine, the rights of the parties, as exhibited upon the pleadings; and order a reference to a master to ascertain whether a partition can be made without prejudice, or if a sale is necessary. The decree may also contain all the provisions of the 178th rule. See the form, Appendix, No. 276.

And there can be no doubt, that if the answers confess the title and interests as set forth, and admit that the property is capable of a partition, the court may declare the rights, adjudge partition to be made, and appoint commissioners.

By the 177th rule, where the rights and interests of the several parties, as stated in the bill or petition, are not contested or denied, if any of the parties are infants, and have put in the usual answer by their guardian, or the bill or petition has been taken as confessed against all or any of the parties to the suit, or owners of the premises, whether known or unknown, the complainant, on filing an affidavit of the fact, may have an order of course, referring it to a master to take proof of the complainant's title and interest in the premises, and of the several matters set forth in the bill or petition, and to ascertain and report the rights and interests of the several parties in the premises, and an abstract of the conveyances by which the same are held.

A question has been made, whether, under this rule, the order may be entered in a case of answers contesting some of the

(1) Ibid., and Rule 177. (2) See Laws 1830, p. 398.

statements or claimsof the bill, and the bill taken as confessed by some of the defendants. I apprehend that this cannot be done. It seems to me, that the fact of there being no contest as to interests as stated, must exist, as well where the bill is taken as confessed by some, as where there are infants. I presume the order may be entered, 1. Where the bill is taken as confessed by all. 2. Where it is so by some, and the answers of others do not contest the allegations of right. 3. Where it is confessed by some, and infant defendants have filed the usual answer, and the answer of others raise no point of litigation; and, 4. Where, in the like case, there are answers of infants, and no denial of rights by others.

But, I apprehend, if any question of law is raised varying the statements of rights, or any matter of fact denied, or new facts averred, producing the like result, the order cannot be entered. Proofs must be taken before the examiner.

In the case of *Fisher* v. *Adams*, 1836, the subject was carefully examined by counsel, and there being two answers filed setting up interests in the premises varying from those stated in the bill, the usual order to take proofs before the examiner was entered. There were infants who had put in the usual answer, and the bill was taken as confessed by several. An abstract of conveyances, wills and descents was exhibited to the examiner, and transmitted with the proofs.

If, however, the case is one proper for this order under the 177th rule, then, if a sale is anticipated as necessary, the order may comprise various other matters of inquiry. By the 178th rule, where the whole premises are so circumstanced that a partition cannot be made without great prejudice to the owners, due regard being had to the power of the court to decree compensation to be made for equality of partition, and to the ability of the respective parties to pay a reasonable compensation to produce such equality, or where any lot or separate parcel of the premises which will exceed in value the share to which either of the tenants in common may be entitled is so circumstanced, the complainant, upon stating the fact in the affidavit which is to be filed for the purpose of obtaining an order of reference under the next preceding rule, may have a further provision inserted in such order of reference, directing the master to inquire and report whether the whole premises, or any lot or separate parcel thereof, are so circumstanced that an actual

partition cannot be made; and that if the master arrives at the conclusion, that a sale of the whole premises, or of any lot or separate parcel thereof, will be necessary, that he specify the same in his report, together with the reasons which render a sale necessary; and in such case, that he also ascertain and report whether any creditor, not a party to the suit, has a specific lien by mortgage, devise, or otherwise, upon the undivided share or interest of any of the parties in that portion of the premises which it is necessary to sell; and if he finds that there is no such specific lien in favor of any person not a party to the suit, that he further inquire and report whether the undivided share or interest of any of the parties in the premises is subject to any general lien or incumbrance by judgment or decree, and that he ascertain and report the amount due to any party to the suit, who has either a general or specific lien on the premises to be sold, or any part thereof, and the amount due to any creditor not a party, who has a general lien on any undivided share or interest therein, by judgment or decree, and who shall appear and establish his claim on such reference. The master, if requested by the parties who appear before him on such reference, shall also ascertain and report the amount due to any creditor not a party to the suit, which is either a specific or general lien or incumbrance upon all the shares or interests of the parties in the premises to be sold, and which would remain as an incumbrance thereon in the hands of the purchaser; to the end that such directions may be given in relation to the same, in the decree for the sale of the premises, as shall be most beneficial to all the parties interested in the proceeds thereof on such sale.

By the act amending certain provisions of the Revised Statutes, (Laws 1830, p. 398,) it is provided, that whenever a reference to ascertain and report incumbrances shall be necessary, the same may be made to a master, or to a register, or clerk, as the court shall think fit.

The order is entered of course upon filing the affidavit. For the form of the affidavit, see Appendix, No. 277.

The order of reference should combine these provisions of the two rules. See the form, Appendix, No. 278.

The statute, with a view to which these rules were formed, provides, [2 R. S. 324, § 43,] that before the making of any order for the sale of the premises, where the creditors, having

specific liens, shall not have been made parties, the court, *on the motion of either party*, shall direct the petitioner to amend his petition, by making every creditor having a specific lien in the undivided interest or estaté of any of the parties, by mortgage, devise, or otherwise, a party to the proceedings.

The reference to a master to ascertain the propriety or necessity of a sale, is made by virtue of the 85th section of the act.(1)

13 Proceedings before the Master.

The first branch of the order which the master is to execute, is to take proof of the complainant's title and interest in the premises, and of the several matters set forth in the bill, and to ascertain the rights and interests of the several parties in the premises.

For this purpose he should require the complainant to produce abstracts, and trace back his title as a tenant in common in the premises, to the common source and title of all the tenants in common therein ; and in his report should, as far as practicable, give an abstract of the conveyances, from that time, of the several undivided shares and interests of the parties.(2)

The master, in judging whether a sale is required, is not to be governed by the consideration that it would be for the benefit of the infant to have his share of the estate converted into money, instead of remaining in land, producing a less income. If it is for their interest to sell their shares for the purpose of a better investment, it may be done afterwards, under the general law relative to the sale of infants' estates, and when they will not run the risk of having their interest in a large property sacrificed for want of funds to compete with their adult tenants in common. The true question to be decided by the master under the statute is, whether the whole property, taken together, will be greatly injured or diminished in value, if separated into several parts, in the hands of several different persons, according to their several rights or interests in the whole. In other words, whether the aggregate values of the several parts, when held by several individuals in severalty, would be materially less than the whole value of the property, if owned by one person.(3)

In the next place, under this order, the master is bound to in-

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(1) 2 R. S., 330.
(2) *Hamilton* v. *Morris*, in Chancery, Sept. 6, 1837.
(3) *Clason* v. *Clason*, in Chancery, July 18, 1837.

quire as to specific liens upon the share of every party to the cause. He should direct searches to be made of the records, in the same manner as if he was examining a title. He may require an abstract of the title to be laid before him, as well to facilitate his inquiries, as because he is to return it to the court with his report. This, with an affidavit of such parties as are in a situation to know the facts as to deaths, descents, intestacy, &c., will enable him to ascertain in whom any part of the estate has been vested, and of course to direct his searches. It may be suggested that a power to examine the parties under oath, would be a judicious provision in the order.

The master should summon the creditors, whom he ascertains, before him, and get a statement from them.

When the master has finished these inquiries, he makes and settles his report in the usual form. See the form, Appendix, No. 279.

The court may, without the report of a master as to its necessity, decree a sale, if the premises appear, upon the pleadings or proof, incapable of a division.(1) But in such a case, it is still necessary to have the reference, for the purpose of ascertaining the specific liens upon the undivided shares of the parties in the premises, and to give the usual notice for persons having general liens. This was the decree in *Hannan* v. *Osborn*, [4 Paige, 344,] where the title had been examined into before the examiner.

The proof given, and the abstract furnished, must be filed.(2) The usual mode is to set forth the abstract in the body of the report. If any testimony has been taken, it should be annexed. If the evidence is merely deeds and bills, I presume the abstract would be sufficient without copies.

The master is particularly to state, whether there are any creditors, by specific lien, not parties to the suit, because, in such case, by the 42d section, [Laws 1830, 397,] the complainant is to amend by making them parties.

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(1) This was done in *Hannan* v. *Osborn*, 4 Paige. At law, there must be a report of the commissioners of the necessity of a sale. [§ 37.] But by the 85th section, instead of appointing commissioners in the first instance, to make partition, if it shall appear by the report of a master, *or otherwise*, that the premises, or any part of them, are so circumstanced, that partition cannot be made without prejudice, the court may decree a sale.

(2) 2 R. S. 321, § 23.

Before the late revision of the rules, an order was to be entered, comprising the matters of the 178th rule, after confirmation of the report under the 177th rule. Now they may be united in one order.(1)

Should it appear that there are such creditors not parties, the bill may be amended to bring them in. And I presume an amendment will always be proper unless the lien has been acquired after bill filed, when a supplemental bill might be proper. See ante, sub. 10.

It also seems to me, that such creditors must be brought in by amendment. In one case I advised a written consent to be taken from a creditor by mortgage, to go before the master, and be bound by his report of the amount due. This was filed, and the amount reported, and directed in the decree to be brought into court. *Pearsall* v. *Pearsall*.(2)

It is provided, that before an order for a sale of the premises, the court shall direct the clerk to ascertain and report whether the shares or interests in the premises of the parties to the suit, or any of them, are subject to any general lien or incumbrance by judgment or decree.(3)

The act appears to be imperative, and in the case referred to, to render it necessary to proceed in the mode prescribed, in order to give the jurisdiction to decree a sale.

Chancellor Walworth held that this must be done, whether the motion is made or not, that is, the court cannot decree a sale without it has been done.(4) The supreme court considered it only necessary when an application was made by one of the parties. It is understood that the judges have reviewed and changed their opinion on this point.

The master, under this order, shall immediately cause a notice to be published once in each week, for six weeks successively, in the state paper, and also in a newspaper printed in every county in which any of the lands in question are situated, requiring all persons having any general lien or incumbrance, or any undivided interest or share therein, by judgment or

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(1) Rule 178.

(2) This course, Mr. Rhoades informs me, has been frequently adopted within his knowledge.

(3) 2 R. S. 324, § 43.

(4) *Wilde* v. *Jenkins*, 4 Paige. 481.

decree, to produce to such master, on or before a certain day to be named in such notice, proof of all such liens and incumbrances, together with satisfactory evidence of the amount due thereon.(1) See the advertisement, Appendix, No. 280. The master must report the names of the creditors, the nature of the incumbrances, the dates thereof, and the several amounts appearing to be due thereon.(2)

It will be noticed, that the 178th rule, and the above statutory provisions, relate only to creditors by specific or general lien, upon an undivided share.(3)

And by the 45th section of the act, if it appear in the proceedings or report, that there are existing incumbrances upon the estate, or interest of any party named in the proceedings in the suit, the court shall, in the order of sale, direct that portion of the monies arising from the sale of the estate, or interest of such party, after deducting his portion of the costs, to be brought into court, and paid to the clerk. And by the 63d section, [2 R. S. 327,] the conveyances executed upon a sale shall be a bar against all persons having general liens, or incumbrances, by judgment or decree, upon any undivided share or interest in the premises sold, in all cases where the notice to such creditors before prescribed shall have been given; and also against all persons having specific liens on any undivided share or interest therein, who shall have been made parties to the proceedings. But no creditor having such specific lien shall be affected by the sale or conveyance, unless he shall have been made a party.(4)

Creditors upon whole premises not parties.

But as to creditors, specific or general, whose claims affect the whole of the premises, the 178th rule also provides, that the master, if requested by the parties who appear before him, shall ascertain and report the amount due to any creditor, not a

(1) 2 R. S. 324, § 44. (2) Ibid.

(3) It appears to me, that the language of the 43d section would comprise general liens on the whole premises. If the shares of the parties to the suit extended to the whole estate, that which affects all the shares, would be a general lien on the whole premises. But the 44th section directs an advertisement as to general liens upon an undivided share only.

(4) See also *Dunham* v. *Menard*, 4 Paige, 442.

party to the suit, which is either a specific or general lien, or incumbrance upon all the shares or interests of the parties in the premises to be sold, and which would remain as an incumbrance thereon in the hands of the purchaser, to the end that such direction may be given in relation to the same, in the decree for the sale of the premises, as shall be most beneficial to all the parties interested in the proceeds.

Searches in the usual manner may be made to ascertain such incumbrances.

Thus, it appears to me, to result from all these provisions, that a creditor by general lien upon the whole premises in question, or upon the whole estate in a distinct parcel of such premises, is not excluded or bound by the advertisement and conveyance.

The object of the reference under the 178th rule, is to enable the court to distribute the purchase money in a proper manner; and if the master reports against the claim of any person having a lien, by judgment or decree, upon the share of any of the parties, the claimant must except to the report in due season to preserve his lien upon the purchase money, which, by the statute, becomes a substitute for the land.(1)

A purchaser cannot except to the decision of the master upon such a lien.(2)

For the Master's Report, see Appendix, No. 281.

If a master has reported that a partition can be made, and commissioners have been appointed for that purpose, it is not correct practice to decree a sale upon a report of such commissioners of its propriety. If the situation of the property, or the rights of the parties, have materially changed subsequent to the master's report, so that an actual partition cannot be made, a special application should be made to the court for a new reference to ascertain whether there can be a division of the property as the rights exist at the date of the reference, and for such other proceedings as may be necessary under the 178th rule, if a sale is found necessary.(3)

Where a master reported that a sale was necessary; that a partition could not be made without prejudice, the court allowed

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(1) *Dunham* v. *Menard*, 4 Paige, 442.

(2) Ibid.

(3) *Reynolds* v. *Reynolds*, 5 Paige, 161.

an exception to his report, and held that an actual partition could be made. A petition was afterwards presented for leave to bring the cause before the court on a motion day, for the purpose of having commissioners appointed. An order to that effect was made, and commissioners appointed.(1) There were infants in the suit, and other considerations induced an application for the preliminary order. There can be no doubt that a petition praying the appointment at once, with notice, would be proper.

15 Decree of sale.

The cause is then to be brought to a hearing upon the report to procure a decree of sale.

If infants are concerned, the reports as to rights and interests must be stated or read at length, for the court is to ascertain and declare the rights, title, and interests of the parties to the proceedings.(2)

The court is empowered to decree a sale, and direct it to be made by a master, under the following provision. Instead of appointing commissioners, in the first instance, to make partition, if it shall appear by the report of a master, or otherwise, that the premises, or any part of them, are so circumstanced that a partition thereof cannot be made without great prejudice to the owners, the court may order a sale of such premises at public auction, by one of the masters, upon the same notice as herein before directed in sales by commissioners, which sales shall be made in the manner herein before prescribed; and on the master's report being confirmed, he shall execute conveyances to the purchasers at such sales, which shall have the same effect as if executed by commissioners, according to the foregoing provisions.(3)

In the decree, the rights and interests of the parties are declared, and a sale decreed. By the 44th section, as amended, (Laws 1830, p. 397,) if it appear by the proceedings or report, there are any existing incumbrances upon the estate or interest in the premises, of any party named in the proceedings in the suit, the court shall, in the order of sale, direct the master to bring into court the portion of the moneys arising from the sale of the estate and interest of such party, after deducting the

(1) *Clason* v. *Clason*, July 18, 1837.

(2) 2 R. S. 321, § 23.

(3) 2 R. S. 320, § 81.

portion of the costs, charges, and expenses to which it shall be liable.

I apprehend that, under this provision, the decree should not direct the payment of the amount reported due upon a lien on a share, or portion in the premises. But it may provide for the payment of the amount due upon a lien covering the whole premises. This was done in *Hannan* v. *Osborn*, May, 1834. And so in *Requa* v. *Chambers*, July, 1832—the master was directed to pay the amount found due upon a specific lien upon the whole of one of several parcels.

If any of the known parties are infants, the court may, in its discretion, direct the share of such infant to be paid over to the general guardian, or to be invested in permanent securities at interest, for the benefit of such infant.(1)

But by the 149th rule, no moneys arising from the real estate of an infant, upon a sale under any decree of the court, shall be paid over to his general guardian, except so much thereof as may be necessary for his support, or maintenance, unless such guardian shall have previously given sufficient security on unincumbered real estate, to account to the infant for the same.

As the security by mortgage is rarely given, the decree usually directs the infant's share to be brought into court, and invested or paid into the trust company forthwith. It would be the duty of the register, &c., to invest it, or deposit it in the trust company, if it should not be applied for in six months.(2) But by directing it in the decree, the interest for this time is saved.

Where any of the parties, whose interests have been sold, are absent from the state, without legal representatives in this state, or are not known or named in the proceedings, the court shall direct the shares of such parties to be invested in permanent securities at interest, for the benefit of such parties, until claimed by them, or their legal representatives.(3) This provision may be inserted in the decree.

Tenancy in dower or by curtesy.

If there is a tenant in dower, or by the curtesy, or for life, in the whole or any part of the premises, and such estate has been admitted by the parties, or ascertained by the court, to be in existence at the time of the order of sale, and the person entitled

(1) 2 R. S., 327, § 64. (2) Rule 179.
(3) 2 R. S., 327, § 65.

to the estate is a party to the proceedings, the court shall first determine whether such estate ought to be excepted from such sale, or whether the same should be sold; and, in making such determination, they shall have regard to the interests of all the parties.(1)

If a sale of the premises, including such estate, shall be ordered, the estate and interest of every such tenant or person shall pass thereby; and the purchaser shall hold such premises free and discharged from all claims, by virtue of any such estate or interest, whether the claim extend to the whole of the premises, or to the undivided share of a joint tenant or tenant in common.(2)

And upon such sale being made of any such interest or estate, the court shall direct the payment of such sum in gross, out of the proceeds, to the person entitled to such estate in dower, tenancy by the curtesy, or tenancy for life, as shall be deemed, upon the principles of law, applicable to annuities, a reasonable satisfaction for such estate or interest, and which the person so entitled, shall consent to accept in lieu thereof, by an instrument under seal, duly acknowledged or proved, in the manner that deeds are required to be proved to entitle them to be recorded.(3)

By the 179th rule, upon such consent being given, the value of the income shall be estimated, according to the then value of an annuity, at 6 per cent. on the principal sum, during the probable life of such person, according to the Portsmouth or Northhampton tables.

If the person entitled does not consent to take such sum in gross, before or at the coming in of the report of sale, the court shall ascertain and determine what proportion of the proceeds will be a just and reasonable sum to be invested for the benefit of the person entitled to such estate in dower, by the curtesy, or for life; and shall order the same to be brought into court for that purpose.(4)

And this proportion is settled by the next section (§ 54) at one-third of the proceeds of the sale of the premises, or one-third of the proceeds of the sale of the undivided share thereof, for a right of dower, and the whole proceeds of such sale, or

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(1) 2 R. S., 325, § 50.
(2) 2 R. S., 325, § 50.
(3) 2 R. S., 325, § 52.
(4) § 53.

of the sale of the undivided share thereof, where the estate is by curtesy or for life.

But in every case, the proportion of the expenses shall be deducted.(1)

And by the 66th section, where the proceeds belonging to any tenant in dower, or by the curtesy, or for life, are thus brought into court, the court shall direct them to be invested in permanent securities at interest, so that such interest shall be annually paid to the parties entitled, during their lives respectively. By the 179th rule, such parts shall be charged with the expense of investing such sum, and of receiving and paying over the interest or income thereof.

If the persons entitled to any such estate in dower, by the curtesy, or for life, are unknown, the court shall take order for the protection of the rights of such persons, in the same manner, as far as may be, as if they were known, and had appeared.(2)

The court may direct the investment of portions of the purchase money, where it shall deem it necessary or proper. And in the case of absent or unknown owners, of tenants by dower, or curtesy, &c., and usually in the case of infants, the shares are directed by the statute to be invested.(3)

The court may, in the order of sale, direct the terms of credit which may be allowed for such portions of the purchase money.(4)

The amount must, however, be secured at interest by a mortgage of the premises sold, by a bond of the purchaser, and by such other security as the court shall prescribe.(5)

The securities must be taken in the name of the register, &c., and his successors in office. If, however, any known owner of full age shall desire to have his share invested, the security shall be taken in his own name.(6) See the form of a decree, Appendix, No. 282.

After the sale is confirmed, the master must deliver the securities to the clerk of the court, or such known owners of full age.(7) The investments are to be made in public stocks of

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(1) 2 R. S., 325, § 54.
(2) Ibid. 326, § 55.
(3) Vide § 38, § 65, § 66, and § 64.
(4) 2 R. S., 323, § 38.
(5) 2 R. S., 323, § 38, 39.
(6) Ibid. § 40.
(7) Ibid. § 41.

the United States or of this state, or on bond and mortgage of at least double the value of the investment. No such security can be discharged or impaired by the act of the clerk, without the order of the court entered in the minutes.(1)

Suits may be promoted upon these securities in the name of the existing clerk by leave of the court, and no suit shall be abated by reason of the death, removal from office, or resignation of the clerk to whom the security was executed, or of any of his successors.(2)

16 Notice of sale.

The notice of the sale is to be the same as upon sales by commissioners.

By the 55th section, the commissioners shall give notice for the same time, and in the same manner as is required by law on sales of real estate by sheriffs on execution. By the act respecting executions,(3) the time and place of holding any sale of real estate pursuant to any execution, shall be publicly advertised previously for six weeks successively, as follows: A written or printed notice thereof shall be fastened up in three public places in the town where such real estate shall be sold. If the sale is to be in a town different from that in which the premises are situated, the notice must be fastened up in three different places of the town in which the premises are situated.

A copy of the notice must be printed once in each week, in a newspaper printed in the county in which the premises are situated, (if there is one.) If there be no newspaper printed in such county, then the notice shall be published in the state paper once a week.(4)

In such notice, the real estate to be sold shall be described with common certainty, setting forth the name of the township or tract, and the number of the lot if there be any, and if there be none, by some other appropriate description.(5)

17 Mode of sale.

The sales are also to be made in the manner prescribed as to sales by commissioners.(6)

If the lands are in the city of New-York, they shall be sold

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(1) 2 R. S., 323, § 70. (2) Ibid. § 71.

(3) 2 R. S., 368, § 34.

(4) The rest of the third clause of the section (2 R. S., 369,) is not applicable to sales upon partition. But still this part of it I apprehend is obligatory.

(5) 2 R. S., 369, § 35. (6) Rule 139.

at public vendue at the Merchants' Exchange, between the hours of 12 o'clock at noon and three in the afternoon, unless otherwise specially directed in the decree of sale.(1)

The terms of such sale shall be made known at the time; and if the premises consist of distinct buildings, farms, or lots, they shall be sold separately.(2)

18 Persons prohibited from buying.

Neither the master, nor any person for his benefit, shall be interested in the purchase, nor directly nor indirectly purchase any of the premises so sold.(3)

No guardian of any infant party in such suit shall purchase, or be interested in the purchase of any lands being the subject of such suit, except for the benefit or in behalf of such infant, and all sales contrary to the provisions of this section shall be void.(4)

Under this section, the chancellor has determined, that the guardian is justified in making a purchase to save the property from a sacrifice, or obtain an advantage to the infant. That he should distinctly announce that he bid for the benefit of the infant, and on his behalf when the property is struck down to him; and should see that the minute of sale of the auctioneer or master is to that effect. That the report of the sale should state such purchase, and be accompanied with an affidavit of the guardian, showing why he deemed the purchase beneficial to the infant. If the court thought his judgment right it would ratify the sale, and then the deed should be executed to the infant, with a power of sale to the guardian, under the statute as to powers.(5) In the case in which this course was pursued, it was deemed advisable by the counsel of the purchaser, that the usual application should be made under the statute for the sale of infants estates, which was accordingly done. See the order, Appendix, No. 283.

19 Report.

The master must make a report of sale. See Appendix, No. 284.

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(1) The 138th rule is general in its language, and applies not only to sales of mortgaged premises, but other real estate directed to be sold by a master. And by that rule, if he is satisfied the property will produce a greater price if sold together than in separate lots, he may sell it together.

(2) 2 R. S., 326, § 57.

(3) 2 R. S., 326, § 58.

(4) Ibid.

(5) *Hannan* v. *Osborn.*

Upon the confirmation of this report, the master shall execute conveyances to the purchasers, which shall have the same effect as if executed by commissioners, according to the provisions of the statute.(1) The order of confirmation is not of course.

The decree of sale (Appendix, No. 285,) directs that the report shall be filed, and upon the same being duly confirmed, and such decree being enrolled, the master shall execute the conveyances. For the form of the deed, see Appendix, No. 286.

And after the master has distributed the moneys, &c., it is usual for him to report the mode in which he has performed the decree. Appendix, No. 287.

By the 61st section of the act, (2 R. S., 327, § 61,) the conveyances shall be recorded in the county where the premises are situated, and shall be a bar both in law and equity, against all persons interested in such premises in any way, who shall have been named parties in the proceedings, and against all such persons and parties as were unknown, if due notice has been given by the publication prescribed. And by the additional section, (Laws 1830, p. 397,) such conveyances shall also be a bar against all persons having general liens or incumbrances, by judgment or decree, on any undivided share or interest in the premises sold in all cases, where the notice to such creditors as is prescribed shall have been given; and also against all persons having specific liens on any undivided share or interest therein, who shall have been made parties to the proceedings. But no creditor having any such specific lien, shall be affected by such sale or conveyance, unless he shall have been made a party to the proceedings.

20 Mode of obtaining amount of lien.

The statute directs, that if there are incumbrances upon the interest of any party named in the proceedings, the portion of such party must be brought into court.(2) By the 46th section of the act, such party may apply to the court to order such moneys, or such part thereof, as he shall claim to be paid to him. This is done upon a notice to the holders of each incumbrance, as is hereafter stated.

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(1) 2 R. S., 321, § 45.

(2) 2 R. S., 330, § 81.

It was before stated, that the master is directed by the order of reference under the 178th rule, to report upon specific or general liens, upon the undivided share of any party to the suit, and if required, as to any general liens upon the whole of the premises.

Under this order, he is empowered to call the owner of the incumbrance before him if a party to the suit, and thus in the presence of the debtor and creditor, to settle the amount due. If there is no contest respecting it, but a mere computation to be made, the decree may declare and adjudge it as a liquidated amount. And yet, as before observed, it does not seem consistent with the statute, to direct payment of the amount where the lien is upon a share only in the premises. But if there is a dispute and litigation as to the validity of the incumbrance or its amount, I have no doubt that the master may report the fact of its existence, the apparent amount due upon it, and of its being contested, and refuse to proceed upon the litigation. The other parties are not to be tied up as to their shares by a litigation between others. At any rate, the court under the equity of the 49th section, would sanction such a course upon a special application for directions to the master.

Then the property being sold, and the portion of the party whose share is incumbered being paid in, the settlement of the amount will be made under the provisions of the act.

The 45th section, (2 R. S., 324,) compared with the 44th, refers only to an application for the proceeds, or a part of them, by the party himself, upon whose share the incumbrance exists. There can be no doubt, however, that if he neglects it, the holder of the incumbrance may apply upon regular notice.(1)

If the party himself apply, he must accompany the application by his own affidavit, stating the true amount due upon such incumbrance, the owner of such incumbrance, and his residence as far as known to him. Also by proof, by affidavit, of the due service of a notice on each owner of any incumbrance of the intention to make such application, and which notice must be given at least fourteen days previously.(2)

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(1) So judgment creditors apply on mortgage cases for an order of reference. And after decree upon a creditor's bill, creditors not actual parties to the suit may apply for leave to prosecute the reference.

(2) 2 R. S., 324, § 46.

If the owner of the incumbrance reside in this state, the notice must be served personally, or if he be absent from his residence, by leaving a copy there with some person of proper age. If such owner reside out of this state, such notice may be served upon him personally twenty days previously, or by publishing the same in the state paper four weeks successively, once in each week.(1)

Upon such application, proof, and notice, the court shall proceed to hear the proofs and allegations of the parties. If a question of fact shall arise, which, in the opinion of the court, cannot satisfactorily be determined without a trial by jury, the court shall award a feigned issue to be tried as in other cases. The costs shall be paid by the party failing.(2) There can be no doubt of the power of the court to ascertain these matters of fact by a reference.

The 47th section, (p. 325,) provides that when the amount of existing incumbrances shall have been ascertained, the court shall proceed to order a distribution of the money, according to the order of the incumbrances.

SECTION II.

ACTUAL PARTITION.

The proceedings are before detailed, down to the order of reference, under the 177th rule.

If the master report that a partition can be made, the report should be filed and confirmed, and then brought to a hearing in the usual manner.

1 Decree.

As before observed, the court is to declare the rights and interests of the parties, and hence, where infants are concerned, the report is read or stated, so as to apprise the court of them.

The decree determines and sets forth such rights, and directs that partition be made between such of them as shall have any right in the premises, according to such rights.(3) Where the part or interest of any parties, known or unknown, shall not

(1) 2 R. S., § 24.
(2) 2 R. S., 324, § 46.
(3) 2 R. S., 321, § 23.

have appeared by the evidence in the case, the court may adjudge partition to be made, so far as the rights and interests of the parties who are known, and who have appeared in the cause, have been ascertained, and the residue of the premises shall remain for the parties whose interests have not been ascertained, subject to a division among them at any future time.(1)

The case of ordinary occurrence, under this section, is where the owners of ascertained shares are unknown. It frequently happens that the heir of a party who was entitled is unknown. The share which the ancestor held is ascertained, but, as his heirs are unknown, there may be one or several to divide that share.

So, again, there may be known owners of a certain share, who have not appeared, and their rights may apparently be certain, yet, as they have not appeared and ascertained them by evidence, the partition cannot extend to them.(2)

This provision corrects the English rule, by which it appears that the plaintiffs and the defendants must appear to be respectively entitled, in distinct shares to the whole subject.(3)

By the decree adjudging a partition to be made, commissioners are appointed to make the partition so adjudged, according to the rights and interests of the parties, as the same are ascertained and determined by the court; and in the decree the court shall designate the part or shares which shall remain undivided, for the owners whose interests shall be unknown, and not ascertained.(4)

The commissioners must be three respectable freeholders.(5)

The English decrees contain a clause for the production of all deeds, surveys, and writings before the commissioners, and that they may examine witnesses, on interrogatories or otherwise, as they shall see fit.(6) See Appendix, No. 288.

2 Account. If one of the parties has been in possession, or received the

(1) Ibid. 321, § 24.

(2) In *Kip* v. *Kip*, one of the parties entitled to a life estate in a certain share of the premises, had previously made an assignment under the insolvent act. The assignee had removed to another state, and was dead. It was charged that the representatives were unknown.

(3) *Agar* v. *Fairfax*, 17 Vesey, 552.

(4) 2 R. S. 321, § 25. (5) Ibid.

(6) Seaton's Forms of Decrees, 184; 2 Newland's Pr., 236; *Manvers* v. *Charlesworth*, 1 Mylne & Keen, 332.

rents, an account will be decreed, or he will be charged with an occupation rent.(1)

In *Hoffman* v. *Treadwell*, March 7th, 1837, the bill was filed for a partition, and called upon one of the defendants to account for rents and profits. She died before the cause came to a hearing. Her heir at law presented a petition to revive. The chancellor held that though the right to a partition, and also to the rents, vested in the same person, the ancestor, yet, upon her death, the petitioner took only the land, and the personal representative became entitled to the rents. The petitioner, therefore, could not revive the suit as to such rents. But, under the Revised Statutes, a suit might be proceeded in by a surviving complainant, in certain cases, notwithstanding an abatement as to part of the original subject of litigation. Under the principle of this provision, the petitioner was authorized to revive the suit, so far as she was interested in its further prosecution only; leaving the parties interested in the other parts of the litigation to revive or not, as to the rents, as they should think proper.

The reference to take such account should be to a master, not the commissioners; the report, when confirmed, should be produced to the commissioners, and the decree may be for payment of the amount—that the amount be deducted from the party's share.(2)

The party in possession will be allowed his expenses for buildings and improvements; a proper proportion to be paid to him or allowed for his allotment.(3)

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(1) *Lorimer* v. *Lorimer*, 5 Mad. Rep. 363. *Hyde* v. *Hindley*, 2 Cox, 408. *Turner* v. *Morgan*, 8 Vesey, 145.

(2) *Hoffman* v. *Ogden*, in Chancery, N. Y., August term, 1835. See the clause, Appendix, No. 238. An account of rents was decreed, to be taken by commissioners, in *Arthur* v. *Arthur*, February, 1822; by a master, in *Bogart* v. *Bogart*, December 8, 1822. *Agar* v. *Fairfax*, 17 Vesey. The court does not employ the commissioners to ascertain titles or interests.

(3) *Swan* v. *Swan*, 8 Price, 443. The defendant, in a bill of partition, stated that he had been several years in possession, and had laid out various sums in buildings and other improvements, and claimed a lien to be paid a moiety of the amount before partition, or that it should be allowed to him in the measure of his allotment. *Per curiam.* Although, in point of law, the plaintiff may not have any lien on the premises, yet, if he has been at expenses in improving them, the plaintiff has clearly no right to take advantage of that expenditure, without making any allowance, and therefore the court will not interfere, except on these terms.

So, if an equal division cannot be made, without allotting the improvements made by one party to another, the latter must pay for them, and the former must account for the rents.(1)

Boundaries in decree.

It is, I believe, the invariable practice in our state, to set forth the boundaries in the decree; and in the commission also, when one is issued. This is not the case in the English precedents. The premises are referred to as those in question in the cause. And, as Lord Redesdale observes, the commissioners are to ascertain the estate from the pleadings.(2) Although a copy of the bill must then be furnished to the commissioners, yet, in many cases, a great saving would be made in costs. If, by the answer or proof, the boundaries of a parcel were varied, that parcel should be set forth as corrected.

3 Commission.

By the English practice, a commission, under the seal of the court, invariably issues to make partition, according to the decree;(3) and most of the practitioners in the city of New-York pursue the same course. I have known it, however, omitted, and by very careful solicitors. It seems to me not essential by the rules of the court, and if those rules render it necessary, they ought to be changed. What possible reason can there be given why the decree should not be sufficient to authorize the proceedings of commissioners, without this additional expense? Masters not only execute orders, but sell mortgaged premises, under a decree, without a writ. At a former period of the court, indeed, a writ issued to the sheriff to sell mortgaged land, but there the decree was general, that the property be sold, and the parties execute the deeds. A ministerial officer was necessary to conduct the sale, and be responsible to the court, and hence a writ issued to the sheriff, in the same manner as a writ of assistance. But now the master is authorized to sell and convey; and in like manner commissioners are, by rule and decree, appointed to make partition. The commission should never be allowed in costs.

For the form of the commission, see Appendix, No. 289.

4 Execution of commission or decree.

If any of the persons appointed commissioners shall die, resign, or neglect to serve, the court may, from time to time, appoint others in their stead.(4)

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(1) *Respass* v. *Beekenridge*, 2 Marshall's Rep. 584. See also *Carter* v. *Carter*, 5 Munf. 106.

(2) Opinion in Seaton's Decrees, p. 194. See the Decree, p. 184.

(3) Allnat on Partition, 108.

(4) 2 R. S., 321, § 62.

The commissioners, before proceeding to the execution of their duty, shall severally be sworn or affirmed, honestly and impartially to execute the trusts reposed in them, and to make partition as directed by the court.(1) Appendix, No. 290.

The oath may be taken before any officer authorized to take affidavits, and shall be filed with the clerk of the court, at or before the coming in of the report of the commissioners.(2)

The commissioners are to proceed to make partition according to the judgment of the court, unless it shall appear to them, or any two of them, that partition cannot be made without great prejudice to the owners thereof; in which case they shall make a return of such fact to the court in writing, under their hands.(3)

It was before stated that the inquiry whether a partition can be made without prejudice, is made by the master, under the 177th rule. The court, therefore, having his opinion that it can be effected, decrees the partition. Still, if the commissioners find it impracticable, without prejudice to the parties, they must so report. When they go into details, a case may easily arise, in which difficulties will be found, not obvious upon the mere superficial examination which a master may make.

All the commissioners must meet together in the performance of any of their duties; but the acts of a majority so met shall be valid.(4)

The commissioners may employ a surveyor, and cause all necessary maps to be made.(5)

At law the sheriff is directed to execute the writ in the presence of the parties.(6) The commissioners are to act for all the parties. They owe a duty to the court, and to all the parties.(7)

Witnesses.

A clause is contained in the English commission, authorizing the commissioners to examine witnesses. The direction is to examine them upon interrogatories, or otherwise, as they think fit—to take the depositions in writing, and return them with the commission.(8)

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(1) 2 R. S., 321, § 27. (2) Ibid. (3) Ibid. § 28.

(4) 2 R. S., § 31. See *Watson* v. *Duke of Northumberland*, 11 Vesey, 158. (5) 2 R. S., 322, § 29.

(6) Hargrave's Coke Litt., 167, n. 3.

(7) *Watson* v. *Duke of Northumberland*, 11 Vesey, 153.

(8) 11 Vesey, 158. Seaton's Decrees, 184. *Meers* v. *Lord Stanton*,

The commissioners act as judges; they examine witnesses to inform their own consciences, and therefore have a discretion as to what points and what witnesses they are to examine.(1) They are not bound to pursue the course of examination pointed out by the parties, nor even to put the questions which the parties desire. They have a discretion different from any possessed by ordinary courts, which are in the hands of the parties, except so far as the rules of evidence interfere.(2)

The court looks upon commissioners in the capacity of witnesses, as well as arbitrators. They are not to determine upon inquiry, and according to the evidence, but to see and judge for themselves, by their own skill and knowledge. This is their principal function, or mode of performing their office; but to aid them they are endowed with a supplementary power of calling for testimony.(3)

Where there are several parcels of ground, the commissioners are not bound to divide each among the parties according to their shares. They may allot a distinct parcel to each party, if of equal value, and if not, may make compensation by what is termed owelty, or equality of partition.(4)

Dick. 21. A like clause was inserted in the decree in *Bird* v. *Wilson*, April 1822, in our court.

(1) Lord Redesdale's opinion upon a commission. Seaton's Decrees, 190.

(2) *Manners* v. *Charlesworth*, 1 Mylne & Keen, 332.

(3) Ibid.

(4) *Clarendon* v. *Hornby*, 1 P. Wms., 446. Lord Chancellor. "Care must be taken that the defendant H. shall have a third part in value of this estate, but there is no reason that any part of the estate should be lessened in value, in order that the defendant should have one third of it. Now if he should have one third of the house and of the park, this would very much lessen the value of both.

If there were three houses of different values to be divided among three, it would not be right to divide every house, for that would be to spoil each; but some recompense to be made, either by a sum of money for owelty of partition to those that have the houses of less value."

In the case of *Bird* v. *Wilson*, 1822, it was ordered, that the commissioners in making partition should not be bound to divide each separate farm, tract or lot, but might, after ascertaining the value of the whole property to be divided, set off, and assign to each party his share in the whole of the lands as to value, in any one or more of the farms, lots or tracts, mentioned in the bill. See also, *Hart* v. *Hawkins*, 3 Bibb's Rep.,

The partition is to be made equal as to the land in question, without regard to advantages to other land of the owners, or any of them.(1)

The commissioners are to divide the estate, and allot the several portions and shares to the respective parties, quality and quantity relatively considered by them, according to the respective rights and interests of the parties as adjudged by the court, designating the several shares and portions by posts, stones, or other permanent monuments.(2)

It has been supposed that in the city of New-York, the act was complied with, by a designation of boundaries on the line or corner of streets or avenues. The allotments are almost always thus described.

Owelty or compensation.

It is provided by the 83d section(3) of the act, that whenever partition shall be decreed by a court of equity, if it shall appear that it cannot be made equal between the parties without prejudice to the rights and interests of some of them, the court may decree compensation to be made by one party to the other, for equality of partition, according to the equity of the case. In the decrees of *Kip* v. *Kip*, *Clason* v. *Clason*, 1837, and *Whittemore* v. *Whittemore*, 1836, the court gave the directions prospectively for the commissioners to make compensation if it was necessary.

5 Report.

The commissioners must make a full and complete report of their proceedings, under the hands of any two of them, specifying therein the manner of executing their trust, and describing the lands divided and the shares allotted to each party, with the quantity, courses and distances of each share, and a description of the posts, stones, or other monuments thereof, and the items of their charges.(4)

This report must be proved or acknowledged before some officer authorized to take proof of deeds, in the same manner as deeds are proved or acknowledged, in order to be recorded. And the report must be filed in the office of the register or clerk.(5) See the form of the report, Appendix, No. 291.

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506. There are very early traces of this principle at law. Brooks' Abrid., Partition, p. 29. But at law, there was no such thing as compensation.

(1) *Watson* v. *Duke of Northumberland*, 11 Vesey, 162.

(2) 2 R. S., 322, § 29.

(3) 2 R. S., 330.

(4) 2 R. S., 322, § 30.

(5) 2 R. S., 322, § 32.

The items of the commissioners' charges are to be specified in the report. The 32d section directs that the expenses of the commissioners, including those of a surveyor and assistants, when employed, shall be ascertained and allowed by the court. The amount shall be paid by the plaintiffs.

6 Correction of report.

The court may, on good cause shown, set aside the report, and appoint new commissioners as often as may be necessary.(1)

I am not aware of any case in our court settling the form of proceeding, whether by exceptions or a motion. In England the latter is the correct course.(2)

So the report may be amended if there is any formal inaccuracy.(3)

Commissioners being named by the parties, the principles which apply to arbitrators are properly applicable to them in it.(4)

If commissioners should by mistake allot a piece of land to one which in fact belonged exclusively to him, and the mistake is not discovered until after sales have been made by the others of their portions, pecuniary compensation will be decreed.(5)

Where the commissioners named by the plaintiffs made one return, and those named by the defendants made another, the court suppressed both, first on the legal ground that the authority given by the writ to four did not empower three to act; and next that the mode of executing the duty was irregular and improper in each set. They had met separately, and each had produced a division without concert or consultation.(6)

7 Final decree.

Upon the confirmation of the report by the court, judgment shall be given that the partition be firm and effectual for ever.(7)

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(1) 2 R. S., 434.

(2) *Jones* v. *Sotty*, 1 Simons' Rep., 136. Exceptions having been taken to a report in partition on the ground of an unequal allotment, the vice-chancellor held that they would not lie. A motion to suppress the return was proper. *Corbet* v. *Davenant*, 2 Br. C. C., 252.

(3) *Manners* v. *Charlesworth*, 1 Mylne & Keen, 334.

(4) *Jones* v. *Sotty*, 1 Simons, 136.

(5) *Dacres* v. *Gagas*, 2 S. & S., 454.

(6) *Watson* v. *Duke of Northumberland*, 11 Vesey, 159.

(7) 2 R. S. 322, § 35.

Under the language of the statute, it is supposed by many practitioners, and by the deputy register in New-York, that the ordinary practice of filing and entering an order to confirm the report, is not proper, or at least useless. The confirmation must be by the court. The practice, in my experience, has generally been to notice the cause for hearing upon the report, and bring it in and file it when the decree is moved for, and make its confirmation part of the decree. See the form of a final decree, Appendix, No. 292.

The decree is binding and conclusive upon all the parties named therein, and their legal representatives who shall have at the time any interest in the premises divided.

8 Abatement.

In the case of *Reynolds* v. *Reynolds*,(1) the report of the commissioners was made during an abatement, and before the rights of the present parties had been ascertained. The rights of all the surviving parties had materially changed by the death of the original complainant, and several new parties were brought before the court by the bill of revivor and supplement. Some of them were infants.

The chancellor directed the report to be set aside; that the cause stand revived, and that an order of reference be made pursuant to the 177th rule, to take proof, &c.

9 Deeds.

Upon proceedings in partition at law, the judgment is sufficient to vest the title in the allotted parcels without a conveyance.(2) But in chancery in England, conveyances are requisite for this purpose.(3)

The former statute, as well as the present, placed partitions in equity in our state on the same footing as those at law, and in consequence conveyances were not essential; and so it was held by our court under the former act.(4)

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(1) 5 Paige, 161.

(2) Allnatt on Partition, *Cave* v. *Helford*, 3 Vesey, 656.

(3) Anon. stated 3 Swanston, 139, n., said by Lord Hardwicke, that where a bill is brought for a partition, a conveyance must be decreed, and therefore all parties necessary to make such conveyance must be made parties to the bill, and brought before the court. So *Whaley* v. *Dawson*, 2 Sch. & Lefroy, 372.

(4) *Young* v. *Cooper*, 3 Johns. C. R., 294. The 84th section, (2 R. S., 331,) connected with the 35th section, (Ibid. 322,) are substantially the same as the provisions of the former act. Sess. 36 Ch. 100, 517.

It has, however, been a very common practice in New-York, to have mutual conveyances executed. The former chancellor, (Jones,) and two of the most experienced and judicious of our practitioners(1) invariably pursue it. It is a great convenience that each person has the evidence of his title to his allotted portion distinct in a deed, instead of being united with the title of others in a long decree.

Where there are infants parties to the suit, the English rule appears now to be, that not only the execution of the conveyances by the infants is respited until they come of age, but by the adults also.(2)

It is admitted that at law there are no conveyances ordered, and that an infant is bound and has no day to show cause.(3) And this I apprehend is the course under the statute in our own courts of law.

I have, however, known decrees directing the guardian *ad litem* to execute conveyances in his behalf.

A serious objection appears to exist to this. The court has no power to decree a conveyance by an infant, or of his estate, except where it is given by statute. The parole may otherwise demur. If the decree, as I suppose it does, binds the infant, it is superfluous; but the conveyance may mislead a purchaser by obtaining the apparent sanction of the court to an act which it has no authority to direct.

The whole difficulty, and much inconvenience might be saved, by a statute authorizing the commissioners to convey. In the case of *Whittemore* v. *Whittemore*, April, 1838, this point was submitted to the chancellor in settling a decree, who considered that such a direction was unauthorized and improper. The purchaser, he observed, might also neglect to see that the decree was enrolled, relying upon the deeds.

10 Costs.

In the case of *Tibbetts* v. *Tibbetts*, June 15th, 1838, the cause came on upon the report of commissioners of their allotments, for a final decree, and directions as to costs. The chancellor held, that the costs of the complainant, and of all the de-

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(1) P. A. Jay and D. S. Jones, Esquires.

(2) *Tuchfield* v. *Biller*, before Lord Hardwicke, stated by Mr. Seaton, (on Decrees, p. 276.) *Davenport* v. *Oldis*, cited Dick. 242. *Attorney General* v. *Hamilton*, 1 Mad. Rep. 214.

(3) *Tuchfield* v. *Buller*, *ut supra*.

fendants who had appeared, should be taxed as between party and party, and the aggregate amount should be apportioned between the parties, according to their respective interests in the premises, as ascertained by the decree; that the final decree should direct that the several parties entitled to such costs, have execution therefor, according to the course of the court; that is, that the several parties where taxed bills should exceed the amount of their rateable proportions of the whole costs, should have execution for such excess against the other parties respectively, for the amount in which the several taxed bills of the other parties were less than the amount of their several proportions of the whole costs.

Costs.

The costs of the guardians *ad litem* of the infants, were declared to be liens upon their respective shares in the premises assigned to them, to the extent of the rateable proportions of such infants of the whole costs. These costs, and the rateable proportions of such infants payable to other parties in the suit, the general guardians of the infants were authorized, and directed to pay out of the rents and profits of the shares assigned to such infants respectively, or out of any other moneys in the hands of such guardians, or which might come to their hands belonging to such infants. And that such guardians might apply to the court for further directions, if necessary, as to the payment of such costs.

In *Clason* v. *Clason*, November, 1838, the taxing officer was directed to make this apportionment.

In the case of *Woodhull* v. *Post*, in chancery, 1839, under such a decree, the following course was pursued. The taxing officer gave a certificate that all the bills of the various parties naming them were taxed at the sum of $1420, viz: The complainants, including the fees and charges of the commissioners, at $1031; the defendant A, at $105; B, at $105; C, at $105; and the two infant defendants at $74 or $37 each. That the proportion of the whole costs chargeable to the complainant was one half, being $710; the proportion of each of the defendants, A, B, and C, was one tenth, or $142, respectively; and of the infant defendants two-tenths, or $284, being $142 for the infant defendant D, and $142 for the infant defendant E. That the excess payable to the complainant was the sum of $321, and such excess was chargeable to the parties in the following proportions, to wit: to the defendants, A, B and C, respectively, the

sum of $37 each, and to the infant defendant D, the sum of $105, and to the infant defendant E, the sum of $105.

No allowance can be made for counsel fees.(1) But the guardian *ad litem* may, in a special case, be allowed counsel fees, payable out of the infant's property.(2)

Lien and execution for costs.

By the 74th section of the act, (2 R. S., 328,) it is provided that when final judgment for partition shall be rendered, the court shall also adjudge each of the parties concerned therein, other than the petitioners, to pay to such petitioners, a proportion of the costs and charges of the proceedings, to be ascertained by the court according to the respective rights of the parties, and the proportion of such costs assessed upon the unknown owners, to be chargeable on the part remaining undivided; and upon such judgment execution may issue as in personal actions, and may be levied on the property of the parties respectively charged with such costs, and upon any share or part of the premises, allotted on such division to any owner unknown or not named, and upon every portion remaining undivided, for the proportion adjudged to be paid by such owners, or chargeable to the part remaining undivided. And a sale of such premises thereupon shall be as valid as if such unknown owner had been named in the proceedings and in such execution.

It is usual to insert a provision to the effect of this statute in the final decree. Appendix, No. 292.

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(1) *Whittemore* v. *Whittemore*, in Chancery, September 5, 1837. Upon an application for an allowance to counsel beyond the fees taxable under the fee bill, on the ground of extra trouble about the suit, the chancellor said, that the court had no power to authorize the taxation in such a case, of any greater amount for council fees than the allowance fixed by the legislature in the fee bill.

(2) *Clason* v. *Clason*, see the decree, Appendix, No. 292.

CHAPTER 32.

INFANTS.

SECTION I.

SALE OF REAL ESTATE OF INFANTS.

THE sale of real estate in which infants are concerned is a subject of much importance, and may be obtained under our statutory provisions in several ways. So jealous and strict were the rules of the common law upon this subject, that to this day there is no mode of procuring such a sale in England. Even upon the debt of the ancestor for which lands may be made liable, the parol might have demurred until the act of William IV., c. 47.

In partition, the conveyances (of the infant at least,) is respited until he comes of age; and upon a mortgage foreclosure, it was a new and bold, though wise step of Lord Eldon, to order a sale upon ascertaining that the benefit of the infant would be promoted.

I have elsewhere observed, that upon foreclosures, it has been the invariable course of our court, for a long period, to sell the land even before there was a statute sanctioning it; and this whether there were infants in the case or not. Office and Duties, &c., 209.

The only approach in England to our own system is in the statute 1 William IV., cap. 65, § 47, authorizing the court of chancery to grant leases of infants' lands, when it shall appear to be for the benefit of the estate. Sugden's Acts, by Jemmett, p. 135.

In the year 1814, an act of our legislature was passed, (Laws 37 session, cap. 108,) authorizing a sale of infants' estate for their support and education, and in 1815, an additional act

authorizing such sale where the interest of the infant required it, (session 38, cap. 106.)

1 In what cases a sale, &c. will be ordered.

By the present statute, (2 R. S., p. 194,) any infant seized of any real estate, or entitled to any term of years in any lands, may, by his next friend, or by his guardian, apply to the court of chancery for the sale or disposition of his property in the manner thereafter directed. And the language of the act as to the cases in which the court may direct such a sale is very broad.

Whenever it shall appear satisfactorily that a disposition of any part of the real estate of an infant, or of his interest in any term of years is necessary and proper, either for the support and maintenance of such infant, or for his education; or that the interest of such infant requires, or will be substantially promoted by such disposition on account of any part of his said property being exposed to waste and dilapidation, or on account of its being wholly unproductive, or for any other peculiar reasons or circumstances, the court may order the letting for a term of years, the sale or other disposition of such real estate or interest, to be made by such guardian or guardians so appointed, in such manner, and with such restrictions as shall be deemed expedient.(1) No real estate or term of years can, however, be sold or disposed of in any manner against the provisions of any last will, or of any conveyance by which such estate or term was devised or granted to such infant.(2)

Under the terms *sale* or *disposition* in the act, applications to mortgage are often entertained by the court. The same construction has long been given to the statute authorizing the sale of lands belonging to religious corporations.

The question has frequently been suggested by counsel, whether the act extended to a case where the infant had only an estate in remainder. I have known several cases before vice-chancellor McCoun, in which a sale has been ordered in such a case,(3) the parties entitled to the life estate having also contracted to sell at the same time. The point depends upon the meaning of the term seised in the 176th section.

Under the former statute of descents, it is undoubted law that there was no such seizin in a remainder or reversion dur-

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(1) 2 R. S., 194, § 181. (2) Ibid. § 182.
(3) *In re* Loomer, January, 1839. *In re* Moore, February, 1839.

ing the continuance of the particular estate, as to constitute the remainderman a new stock; he dying while the particular estate was undetermined. The seizin was in the actual possessor.(1)

Seizin, says Lord Coke, imports the having possession of an estate of freehold or inheritance in lands or tenements. Co. Litt. 153.

So by the old law, there could not be a seizin of a rent to support an *assise* without an actual taking of it, or a part of it as a symbol. An attornment by the tenant to the purchaser of the rent was insufficient, though if a penny was given by him by way of seizin, it would do; or, if he was put in seizin after recovery, by a branch or turf of the land delivered to him, it was enough. Viner's Ab., title Seizin, Vol. 19, p. 306. So Jacob's Law Dictionary, title Seizin, "It signifies in the common law possession." Yet it is said (Fitzh. Nat. Br., 179, H.) that there shall be an assise to the successors of a parson, upon the seizin of the parson by the hands, &c.

And in *Wrottesley* v. *Adams*, 1 Plowden's Rep., 191, an exception was taken to the count because it ran that after the election of each of the priors, it was said, "by force whereof he was seised of the reversion," whereas it ought to have been said, "in his demesne of fee." For he should have an assise if the termor was ejected, and in such things whereof a man shall have an assise, he shall say in his count *countant* "that he was seised in his demesne as of fee." But if the reversion had been dependent on an estate for life, he should say *ut supra*, but here he ought to say, "in his demesne as of fee." To which it was answered by the court, that true it is he might have said so, and it would have been good, and yet the other form of pleading is good also; for which reason a man may say of a reversion dependent upon an estate for years, as well as dependent upon an estate for life, that he was seised as of fee." See also Dyer's Rep. 256, b. (257 a.) and Year Books 2 Henry VI. 7—45 ed., 3. 26.

2 Who may apply.

The next friend, or guardian of the infants may apply for the sale. The statute directs (§ 176,) that the infant may by his next friend, or guardian, apply to the court for the sale or

(1) 3 Johns. Cas., 214.

disposition of the estate. By the 158th rule, the general guardian of the infant, if he has any, and if there is none, the infant himself, if of the age of 14 years or upwards, may apply. And if the infant is under the age of 14 years, some relative or friend may make the application.

In a case in which the infant was over fourteen, but resided in another state, the petition was presented by and in the name of a next friend. And the case was brought before the chancellor, on the supposition that the vice-chancellor could not, in a special instance, deviate from a rule of court. The chancellor made the order.(1)

Perhaps under the 176th section, the application ought to be always, by a next friend or guardian, whether the infant is over or under 14 years.

If there is no general guardian, it should be so stated in the petition.(2)

3 Form of application.

The application must be made by a petition.(3) It must state the age and residence of the infant, the situation and value of his real and personal estate, the situation, value and annual income of the real estate proposed to be sold, and the particular reasons which render the sale of the premises necessary or proper; and must pray that a guardian be appointed to sell the same. It must also state the name and residence of the person proposed as such guardian, the relationship, if any, he bears to the infant, and the security proposed to be given.(4) See the form, Appendix, No. 293. It must be sworn to.(5)

4 Preliminary certificate of a master.

The petition, before it is brought before the court, shall be presented to the master who is nearest to the residence of the infant, if a resident of this state; or if a non-resident, to any injunction or taxing master.(6)

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(1) June —, 1835. Petition, *M. Hoffman*, next friend of C. H. and others, infants. The power of the chancellor to pursue a different practice in any particular case from that prescribed in a general order of court, is recognised in *Doras* v. *Brougham*, 6 Car. & Payne, 248; Eng. Com. L. Rep., 390.

(2) *In re Lansing*, 3 Paige, 266. (3) Rule 158.

(4) Rule 158. (5) *In re Lansing*, 3 Paige, 265.

(6) Rule 159. It is supposed by some masters in New-York, that the master, whose office, or whose house is nearest the abode of the infant, must be applied to. The rule is to enable the court to have the benefit of the personal knowledge of the master, by which he can better direct his in-

Such master shall inquire, and certify whether the person proposed as guardian, is a suitable and proper person for that purpose, and whether the persons proposed as his sureties are each worth the requisite sum over and above all debts, or that the land proposed to be mortgaged by way of security is unincumbered, and of the required value.(1)

5 Who may be such guardian.

If there is a general guardian of the infant already appointed, he is the proper person to be appointed guardian to effect a sale. And this whether he has been so appointed by a surrogate, or by this court. But if the general guardian cannot procure security, another person may be appointed.(2)

Additional security must be given by such general guardian; as the security given by him, whether he is appointed by the surrogate or this court, is only to cover the amount of the rents during the minority.(3)

If the master is not satisfied with the person nominated as guardian, or with the security proposed, he may name a suitable person as guardian, and state what further or other security should be given.(4)

The husband of an infant cannot be appointed the guardian to make such sale.(5) He may join with the general guardian if there is one, or a next friend.(6)

6 Security.

The guardian shall give bond to the infant, to be filed with the register or assistant register in such penalty, with such sureties, and in such form as the court shall direct, conditioned for the faithful performance of the trust reposed; for the paying over, investing, and accounting for all moneys that shall be re-

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quiries, as well as to save expense. It would be always expedient to follow it literally, and to take the master whose office was in the nearest street. But there can be no doubt that a purchaser would be safe, if the proceeding was before a master in any part of the city, the most remote from the residence of the infant. It is a case which the court must look to, and not the purchaser.

(1) Rule 159. The 171st section (2 R. S., 194) of the statute is, that on such application, the court shall appoint one or more suitable persons guardians of such infant, in relation to the proceedings.

(2) *In re Wilson*, 2 Paige, 412.

(3) 2 R. S., 151, § 8. Rule 151. (4) Rule 159.

(5) *In re Whittaker*, 4 Johns. C. R., 378. *In re Lansing*, 3 Paige, 265.

(6) Ibid.

ceived by such guardian, according to the order of any court having authority to give directions in the premises; and for the observance of the orders and directions of the court in relation to the said trust.(1)

And by the 157th rule, the security required on the sale of the real estate of an infant, shall be a bond of the guardian, with two sufficient sureties, in a penalty of double the value of the premises, including the interest on such value during the minority of the infant, each of which sureties shall be worth the penalty of the bond over and above all debts; or a similar bond of the guardian only, secured by a mortgage on unincumbered real estate of the value of the penalty of such bond.(2) The sureties should make an affidavit of their sufficiency. See the form, Appendix, No. 294.

7 Master's certificate.

The master, after making the requisite inquiries as to the competency of the proposed guardian, and sufficiency of the sureties, makes a certificate to that effect. See Appendix, No. 295.

It is not sufficient for the master to certify that the persons offered as sureties are worth the *requisite sum*, in the precise words of the rule. He should go into an examination of the age of the infant, and the actual value of his interest in the property so far at least as to ascertain that the value of the property as stated in the petition is substantially correct. And from these data he should ascertain and certify what is the requisite sum in which security is to be given.(3)

It is not necessary or proper for the master to take down and return to the court, in the shape of affidavits or otherwise, all the testimony taken before him. He may ascertain the necessary facts by a *viva voce* examination of the sureties, witnesses, and parties on oath, and he should certify the result of his inquiries as briefly as possible.(4)

8 Order upon master's certificate.

The petition, with the certificate, is to be presented to the chancellor or vice-chancellor. If it then satisfactorily appear, that there is reasonable ground for the application, an order may be entered, appointing a guardian for the purposes of the application, on his executing and filing the requisite security,

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(1) 2 R. S., 194, § 178.
(2) Rule 157.
(3) *In re Lansing*, 3 Paige, 266.
(4) *In re Morrell*, 4 Paige, 48.

approved of by the master, signified by his approbation endorsed thereon.(1)

This order also directs a reference to any injunction or taxing master, or to a master specially designated by name therein, to ascertain the truth of the facts stated in the petition, and whether a sale of the premises, or any and what part thereof, would be beneficial to the infant, and the particular reasons upon which his opinion is founded.(2)

It is needless to state more of the provisions of the 160th rule, because the order under which the master acts must follow it with great precision. See the form, Appendix, No. 296.

It will be observed, that in the form of the order is contained a clause, that the bond shall be acknowledged according to the provisions of an act relative to proceedings in suits commenced by declaration and for other purposes.

This act was passed April 29th, 1833, (sess. 56, cap. 271, § 9.) And it was therein provided, that every written instrument (excepting promissory notes, bills of exchange, and last wills) may be proved or acknowledged in the manner now provided by law for taking the proof or acknowledgment of conveyances of real estate.(3)

The officer with whom the bond is filed, must see that it is properly executed before he gives the certificate directed by the 160th rule.(4)

9 Proceeding under this order.

The master shall not proceed upon the reference, until the guardian produces to him a certificate of the register, assistant register or clerk, that the bond has been duly proved or acknowledged, and filed agreeably to the order of the court.(5)

The master must not rely upon the petition as evidence of the facts he is to ascertain. He must examine witnesses as to them.(6)

The order founded upon the 160th rule, is, 1st, to ascertain the truth of the facts stated in the petition. These are the age and residence of infant, the situation and value of his real and personal estate, the situation, value, and annual income of the

(1) Rule 160.
(2) Ibid.
(3) 2 R. S., 325, § 74. Edit. 1836.
(4) In the matter of *Morrell*, 1 Paige, 45.
(5) Rule 160, and 2 R. S., 195, § 180.
(6) In the matter of *Morrell*, 4 Paige, 44.

real estate proposed to be sold, and the truth of the reasons (which can scarcely be any thing but facts) for making a sale.

It will be seen, that as to some of these matters, viz: the age of the infant, and the value of the property to be sold, the master must have inquired, when the petition was presented to him, if the same master acts in both instances. The testimony then used may undoubtedly be resorted to under this order.

The value of the real estate of the infant, exclusive of that proposed to be sold, and of the personal estate, are new matters of inquiry. And the course is to take the affidavits of persons connected with the infant by kindred, or business, or of any persons from whose situation the master thinks the most accurate information can be obtained.

2d. The reasons which are stated in the petition as to the necessity or propriety of a sale, are next to be inquired into under the comprehensive language of the 160th rule.

The fact that the property of an infant is liable to the expense of a proceeding in partition by adult owners of an undivided share thereof, is always taken into consideration in deciding upon the propriety of authorizing a sale. It is always a good reason for selling an infant's undivided share, that the estate is held in common with adults, and that its value is small when compared with the expense of a partition suit, to which it will be subjected, if a sale by a special guardian should be refused.(1)

The language of the statute, it will be observed, is very broad, as to the authority of the court. After specifying several particular cases, it empowers the court to make a sale wherever it shall appear beneficial to the infants for any other peculiar reasons or circumstances. (§ 181.)

10 Report.

The master having finished his inquiries, under this order makes a report. See Appendix, No. 297.

11 Order to contract.

Upon this, if the court see no objection, an order is made, giving authority to the guardian to contract for a disposition of the property either at private or public sale, first reporting the terms of such agreement to the court for its approbation.(2) Appendix, No. 298.

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(1) In the matter of *Congdon* Infants, 2 Paige, 566.

(2) 2 R. S., 195, § 183. Upon an agreement for a sale leasing or other disposition of such property being made, the same shall be reported

For the form of such a report by the guardian, see Appendix, No. 299.

12 Report of guardian, and order.

And a final order of confirmation is then made, directing a conveyance and the appropriation of the proceeds. Appendix, No. 300.

All sales, leases, dispositions, and conveyances made in good faith by the guardian in pursuance of such orders, when so confirmed, shall be valid and effectual as if made by such infant when of full age.(1) For the form of the deed, see Appendix, No. 301.

13 Deed.

The practice has varied much, whether to make the infants by name parties of the first part, by their guardian, in the same manner as the deed of a principal executed by an attorney, or to make the guardian by name party of the first part.

In proceedings under the statute as to infant trustees, it seems well settled by practice that the former is the proper form, and this is sanctioned by a decision of the vice-chancellor of the first circuit.(2) See Office, &c., of Masters in Chancery, p. 146.

The language of the statute in the case of infant trustees is somewhat different, and the practice of the most experienced counsel in New-York, is to make it the deed of the guardian.

14 Final report.

I have pursued the course of obtaining from the guardian, a report of the consummation of the sale by the execution of the conveyances, the reception of the money, deductions for costs, &c., and disposition of the balance. This was filed with the assistant register when the proceeds were deposited. And I obtained also an order confirming this report, and the sale and conveyance so made. See section 184.

If the proceeds of the sale exceed $500, and the guardian has not given security by mortgage upon real estate, he shall bring the proceeds into court, that the same may be invested in stocks, or put out at interest by the register, &c., for the use of the infant.(3)

The infant is declared to be a ward of the court from the

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to the court on the oath of the guardian making the same; and if it be confirmed, a conveyance shall be executed under the direction of the court.

(1) Ibid. § 184.

(2) Matter of *Windle*, 2 Edwards, 585. (3) Rule 161.

time of the application, so far as relates to the property, its proceeds or income, and the court shall make order for the application and disposition of the proceeds of such property, and for the investment of the surplus belonging to such infant, so as to secure the same for the benefit of such infant, and shall direct a return of such disposition and investment to be made on oath as soon as may be, and shall require accounts to be rendered periodically by any guardian, or other person who may be intrusted with the disposition of the income of such proceeds.(1)

The proceeds of a sale under this act are not rendered personal estate. The 186th section provides, that no such sale shall give to the infant any other or greater estate or interest in the proceeds, than he had in the estate so sold; but the said proceeds shall be deemed real estate of the same nature as the property sold.

SECTION II.

APPOINTMENT OF A GENERAL GUARDIAN.

1 Petition by infant, &c.

For the purpose of having a general guardian appointed, the infant, if of the age of fourteen years or upwards, or some relative or friend, if the infant is under fourteen, may present a petition to the court, stating the age and residence of the infant, and the name or residence of the person proposed or nominated as guardian, and the relationship, if any, which such person bears to the infant, and the nature, situation, and value of the infant's estate.(2)

If an estate in lands has become vested in the infants, the guardianship of such infant, with the rights, powers, and duties of a guardian in socage belongs to the father; if there be no father, to the mother; and if there be neither father nor mother, to the nearest and eldest relative of full age, not being under any legal incapacity. Between relatives of the same degree of consanguinity, males shall be preferred.(3) All statutory provisions relative to guardians in socage are applicable to such guardians.(4)

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(1) 2 R. S., 195, § 185.
(2) Rule 150.
(3) 1 R. S., 718, § 5.
(4) Ibid. § 6.

But the rights and authority of every such guardian, shall be superseded wherever a testamentary or other guardian shall have been appointed under the eighth chapter of the third title of the act.(1)

By that chapter, the right of a father to appoint a testamentary guardian is recognised and regulated, and provision is made for such appointment by a surrogate in other cases, with the right of appeal to the chancellor.(2)

It is observed by chancellor Kent, (Commentaries, 2 Vol. p. 226,) that guardians by socage or nature have become essentially superseded in practice, by guardians appointed by the court of chancery, or by the surrogates of the several counties.

The authority of the chancellor in the appointment of guardians, is a part of his general jurisdiction over minors and their estates. It continues until the majority of the infant, and is not to be contested by the infant upon his arriving at the age of fourteen.(3)

I do not understand that any provision of the Revised Statutes, has abolished the right of the father to take the rents of lands given to an infant, which he had before the statutes, as guardian in socage. See *Putnam* v. *Ritchie*, 6 Paige, 398.

But as to the personal estate, it appears settled, that the father, as guardian by nature, is not entitled to receive money given to his infant child.(4) Some person must be appointed by legal authority.

For the form of the petition, see Appendix, No. 302.

2 Inquiries by a master.

Previous to presenting the petition to the court, the petitioner, if the infant reside in the city of New-York, shall present the petition to the taxing or injunction master, or to one of the exception masters in that city; or if the infant resides in any other county, to the master nearest his residence; or if he resides out of the state, to any exception, taxing, or injunction

(1) 1 R. S., 718, § 7. (2) 2 R. S., 150.

(3) Kent's Com., Vol. IV., p. 226, and Cases.

(4) *Cunningham* v. *Harris*, reported 3 Bro. Ch. Rep., 186. *Genet* v. *Talmadge*, 1 Johns. Ch. Rep., 3. I have not met with any case settling whether payment of the income of personal estate to a father would be valid.

master, in order to make certain inquiries directed by the rule.(1)

The master shall, by inspection or otherwise, ascertain the age of the infant; if he is of fourteen years or upwards, he shall examine him as to his voluntary nomination of a person as guardian; if he is under fourteen, the master shall ascertain who is entitled to the guardianship, and shall name a proper and competent person as guardian.(2)

He is also to ascertain the amount of the personal property, and the gross amount or value of the rents and profits of the real estate of the infant during his minority; and also the sufficiency of the security offered by the guardian.(3)

In making such inquiries, the master, in his discretion, may direct notice to be given to such of the relatives of the infant as he may think proper, to appear before him, and be heard in relation to the application. And it shall be the duty of the master in all cases, to see that the rights of the infants are properly guarded and protected, and he may require the attendance of such witnesses before him, to give testimony on the subject of the application as he may think necessary or proper.(4)

3 Master's report.

The master shall annex to the petition, a report containing the particulars mentioned in the rule, specifying what relatives or friends of the infant have been notified to appear before him, if any, and if none have been notified, stating the cause thereof. The report must also state, that each of the persons proposed is worth the requisite amount, over and above all his debts, or that the real estate proposed to be given as security, is of the value required by the rules of the court.(5) See the report, Appendix, No. 303.

4 Security.

The security to be given by the general guardian of an infant, shall be a bond in a penalty of double the amount of the personal estate of his ward, and of the gross amount or value of the rents and profits of the real estate during his minority, together with at least two sufficient sureties, each of whom shall be worth the amount specified in the penalty of the bond over and above all debts; or instead of personal security, the guardian may give security by way of mortgage, on unincum-

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(1) Rule 151. (2) Ibid. (3) Ibid.
(4) Ibid. 152. (5) Ibid.

bered real property, of the value of the penalty of his own bond only.(1)

The court, however, may vary the security where, from special circumstances, it may be found for the interest of the infants; and may direct the principal of the estate, or any part thereof, to be invested in public stocks, or with the Trust Company, or on bond and mortgage, in the name of the register, assistant register, or clerk, for the benefit of the infant, and that the interest or income thereof only be received by the guardian.(2)

The duty of the master, in ascertaining the requisite security and the sufficiency of the sureties, is the same as under the 157th rule. See *ex parte Lansing*, 3 Paige, 265.

5 Order of appointment.

The petition and report must be presented to the court, when an order will be made for the appointment of the guardian; or the court may direct a further reference, and direct what relatives or friends of the infant shall have notice to attend on the same. See the order, Appendix, No. 304. And the form of the bond, Appendix, No. 305.

The appointment shall not be valid, until the requisite security is given and filed in the proper office, with the certificate of the master endorsed thereon, approving of the form and manner of the execution thereof.(3)

6 Power as to proceeds of real estate.

The general guardian of an infant, cannot receive any part of the proceeds of a sale of real property belonging to such infant, sold under a decree or order of the court, until he has given such further security for the faithful discharge of his trust, as the court may direct.(4)

And by the 149th rule, no moneys arising from a sale of the real estate of an infant under any order or decree, except so much of the income as may be necessary for his support, shall be paid to the general guardian, unless security has previously been given by him on unincumbered real estate, to account to the infant in the usual form.

7 Removal.

If a guardian has been appointed by a vice-chancellor, an application for his removal, or to compel an account, should be made to that officer, or his successor.(5)

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(1) Rule 148. (2) Ibid. (3) Rule 153.
(4) Rule 147. See *Ferris* v. *Brush*, 1 Edw. Rep., 572.
(5) In the matter of *Kennedy*, 5 Paige, 244.

8 Inventories, &c.

Every general guardian shall, within six months after his appointment, file in the office where the appointment is entered, a just and true inventory under oath, of the whole real and personal estate committed to his care or guardianship, and of the manner in which any funds under his care or control belonging to the estate are invested; stating the income and profits of the funds or estate, and the debts, credits and effects, so far as the same have come to his knowledge.(1) For the form of an inventory, see Appendix, No. 306.

SECTION III.

INFANT TRUSTEES AND MORTGAGEES.

By the statute (2 R. S., 193, § 173,) whenever any infant shall be seised or possessed of any lands, tenements, or hereditaments, by way of mortgage, or in trust only for others, the court of chancery, on the petition of the guardian of such infant, or of any person in any way interested, may compel such infant to convey and assure such land tenements and hereditaments, to any other person, in such manner as the said court shall direct.

And every conveyance or assurance made pursuant to such order, shall be as good and effectual in the law, as if the same were made by such infant when of lawful age.(2)

This is a re-enactment of the former act, (that of 1813,) without alteration. The English statute from which it was taken, is the 7th of Queen Ann, cap. 19.

In the author's former work, the authorities are collected upon the question, who are infant trustees within the act, and the course of practice in the master's office is stated.(3)

The English authorities were contradictory upon the point, whether the infant heir of a vendor, when the contract was unfulfilled, was within the act. By a statute of our state, Laws,

(1) Rule 154. (2) 2 R. S., 194, § 174.
(3) Office, &c., Masters in Chancery, p. 141.

1814, p. 128, § 3, (2 R. S., 194, § 175,) this difficulty is removed. The provision will be afterwards noticed.

Petition necessary.

The application must be by petition. A motion will not do.(1) See the form, Appendix, No. 307.

The petition is of course *ex parte:* an order is made, for the form of which, see Appendix, No. 308.

Notice is to be given to the guardian or next friend of the infant, and this is made part of the order.

The notice is generally by a summons from the master to attend. See Office, &c., Masters in Chancery, p. 141. *et seq.*, for the proceedings before the master.

When the master's report is obtained, a petition must be presented to confirm it, and that the infant be directed to convey. Notice must be given to all who have appeared before the master, and objections, if any, may then be made. For the form of the order, see Appendix, No. 309.

As to the settlement of the conveyance, and its form, see Office, &c., Masters in Chancery, p. 145.

Several important alterations have been made in the English rules upon this subject, by the statute, 1 Wm. IV., cap. 60. The 6th section of that act is substantially a re-enactment of the statute of Ann, the clause, *on the petition of any person interested*, &c., being however omitted.

By the 15th section, every person, being in other respects within the meaning of the act, shall be, and be deemed to be, a trustee within the meaning of the act, notwithstanding he may have some beneficial interest or estate in the same subject, or may have some duty as trustee to perform; but in every such case, and in every case of a mortgagee, (not being a naked trustee,) it shall be in the discretion of the Lord Chancellor, or the court of chancery, if under the circumstances it shall seem necessary, to direct a bill to be filed to establish the right of the party seeking the conveyance or transfer, and not to make the order for such conveyance or transfer unless by the decree to be made in the cause, or until after such decree shall have been made.

The decisions which rendered this statute necessary, are stated, Office, &c., Masters in Chancery, p. 142.

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(1) *Evelyn* v. *Forster*, 8 Vesey, 96. The jurisdiction, the Lord Chancellor says, was given to be exercised by a petition.

In the matter of *Windle*, (2 Edw., 587,) the father of certain infants had purchased the premises, and had the conveyance made to his wife, he being an alien. Upon her death, the legal estate vested in her children, and upon a petition they were declared trustees, and he being naturalized, were directed to convey to him. The proceedings are stated in detail in the report, and will be found useful.

In this case, the vice-chancellor approved the form of the deed, as stated in the author's former work, viz. A. B., (the infant,) by C. D., the guardian *ad litem*.

It may be observed, that the case of such a reference, to ascertain whether the infant is a mortgagee within the act, could scarcely occur with us. This inquiry in England, is usually where a bill to redeem is brought, and the heir of the mortgagee is an infant. The legal estate being in him, a reconveyance is requisite; but in our state, the money would be paid to the personal representative, who would be ordered to satisfy the mortgage of record, and that would be sufficient.

SECTION IV.

ENFORCEMENT OF THE CONTRACTS OF ANCESTOR.

The court of chancery shall have power to decree, and compel a specific performance, by an infant heir, or other person, of any bargain, contract, or agreement made by any party who may die before the performance thereof, on petition of the executors or administrators of the estate of the deceased, or of any person or persons interested in such bargain, contract, or agreement, and on hearing all parties concerned, and being satisfied that the specific performance of such bargain, contract, or agreement ought to be decreed or compelled.(1)

I believe this provision was first adopted in the year 1814.(2)

An English statute was passed upon this subject in July, 1830.(3) It differs from our act, in the important particular,

(1) 2 R. S., 194, § 175.
(2) Laws, 1814, p. 129, § 3.
(3) 1 Wm. IV., cap. 60, § 16.

that there must be a decree for a specific performance, either before or after the death of the vendor of the land.

It will be observed, that a petition is the proper mode of applying to the court. See the form, Appendix, No. 310.

Upon this, an order of reference is usually made, although, if the case is very clear, and notice of presenting the petition has been given, the court may decide without such inquiry. For the form of the report, see Appendix, No. 311.

According to the decision in the case of *Evelyn* v. *Forster*, 8 Vesey, 96, before noticed, the report should be brought before the court on a petition to confirm it, and for an order to enforce the performance. For the form of the final order, see Appendix, No. 312.

CHAPTER 33.

DIVORCE.

SECTION I.

DIVORCE ON THE GROUND OF NULLITY OF MARRIAGE.

THE contract of marriage, as regulated by the common law and the law of England, is indissoluble even on the ground of adultery, except in the latter case, by an act of parliament. Nothing more can be procured than a separation from bed and board.(1) But it has long been provided by a statute of our state, that the marriage tie may be wholly dissolved for the cause of adultery.(2)

Before the Revised Statutes, it was decided in our court of chancery, that such a dissolution could not be obtained upon any other grounds which by the ecclesiastical laws would warrant it; that such law, though embodied as part of the English law, did not prevail here. But it was also held, that a marriage might be declared void upon grounds which would be sufficient to set aside a contract in the ordinary exercise of chancery power, such as from being entered into by a lunatic, or obtained through fraud.(3)

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(1) Sciendum est igitur legitime contractum matrimonii dissolvi non posse, quippe a deo conjuncti, ab homines separari non debere nec-valeat. Inst. Jur., Canon, Lib. 2, tit. 16. The form of marriage of the Episcopal Church, contains an injunction almost literally translated from this passage. This is in opposition to the law of each of the United States, unless understood with much qualification. For a view of this question, and the opinions of divines and legislators upon it, see Paynter, Law of Divorce, p. 169, &c.

(2) Laws of 30th March, 1787.

(3) *Burtis* v. *Burtis*, 1 Hopk., 563.

Our legislature, however, interposed at the revision in 1830, and adopted some of the leading doctrines of the ecclesiastical law upon this subject.

1 Nullity of marriage for nonage, &c.

A decree of the nullity of a marriage may now be obtained upon the ground of nonage—of the existence of a former husband or wife, with whom the marriage is in force; of idiocy, or lunacy at the time of the contract; of force or fraud in obtaining a consent, and for impotency.(1)

It is of importance to be observed, that in all these cases, except that of the existence of a former husband and wife, the marriage is void from the time of the decree of nullity being pronounced, not *ab origine*. In the case of a former marriage, it is void from the beginning, except where the husband or wife has been absent for the space of five successive years, without being known to the other to be living during that time; a marriage during the life-time of such absent party, shall only be void from the time of sentence of nullity being pronounced.(2)

Every male who shall have obtained the age of 14 years, and every female of 12 years, shall be capable in law of contracting marriage.(3)

The bill to annul the contract on the ground of nonage, may be brought by the parent or guardian entitled to the custody of such minor, or by the next friend of such minor.(4)

The bill cannot be brought if the party so under age has freely cohabited as husband or wife after attaining the age of consent,(5) nor can the marriage be annulled on the application of the party who was of lawful age at the date of the contract.(6)

It may be a question, whether the provision of the Revised Statutes, (2 R. S., 446,) directing the appointment of a next friend where an infant is plaintiff, applies to the present case.

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(1) 2 R. S., 142, § 20. (2) 2 R. S., 139, § 3, 4, & 5.

(3) The rule of the common law recognised by a decision in this state was as stated in the text. The revisors suggested an alteration, making the age of the male 17, and the female 14. Such was the provision of the statute as originally enacted. By the act of 1830, ch. 320, § 24, that section of the original act was repealed. The effect of this must be, I presume, to restore the former law; a most strange abandonment of what seems to me, but a slight step towards wise legislation.

(4) 2 R. S., p. 142, § 21. (5) Ibid. (6) Ibid.

The statute (2 R. S., 142, § 21,) provides that such bill may be filed by the parent or guardian, or by a next friend. I incline to think, however, that the act first referred to should be pursued. At any rate, it prevents any question arising, and as security would not be required in such a case to account for money, it seems advisable to follow it. See the practice stated, Vol. I., p. 54.

The chancellor, in case of a bill for a separation, has determined that the responsibility of a next friend means that he should be able to pay the costs, which being fixed at $250 where security for costs is given, a next friend ought to be worth at least that sum over and above all his debts.(1) It may therefore be suggested, whether an affidavit to that effect should not be taken upon making the appointment.

If the bill is on behalf of a *feme covert*, there must be a next friend, whether the suit is to annul the marriage on the ground of nonage, or any other cause.

2 Former marriage.

If the marriage is sought to be annulled on the ground that a former husband or wife of one of the parties was living, it may be declared void on the application of either of the parties during the life-time of the other, or upon the application of such former husband or wife.(2)

By the 23d section, the issue of the subsequent marriage, where it was contracted with the full belief of the parties that the former husband or wife was dead, are entitled to succeed in the same manner as legitimate children. The issue so entitled must be specified in the sentence of nullity. This extends to children born or begotten before the sentence of nullity is declared.

Every marriage during the life-time of a former husband or wife, is absolutely void from its date, except where the former marriage of the party re-marrying has been dissolved or annulled for any cause, except the adultery of such party, and except where the former husband or wife has been finally sentenced to imprisonment for life.(3)

If, however, any person whose husband or wife has absented himself for five successive years, without being known to such person to be living during that time, shall marry during the life

(1) *Robertson* v. *Robertson*, 3 Paige, 388.
(2) 2 R. S., 142, § 22.
(3) 2 R. S., 139, § 5.

of such absent husband or wife, the marriage shall only be void from the time of the nullity being pronounced.(1)

3 On the ground of idiocy.

If the ground for annulling the marriage is the idiocy of one of the parties, the application may be made by any relative of such idiot interested to avoid the marriage at any time during the life-time of either of the parties.(2)

So, if the ground is lunacy, any relative of the lunatic interested to avoid the marriage, may apply, during the continuance of the lunacy; or after the death of the lunatic in that state, during the life of the other party to the marriage.(3)

So the lunatic may himself apply after his restoration to reason, but no sentence shall be pronounced, if it appear that the parties have freely cohabited after the lunatic was restored.(4)

And as to both idiots and lunatics, if no relative applies, a next friend, admitted by the court to prosecute as such, may apply to have the marriage annulled during the life-time of both parties.(5)

The children of a marriage annulled on the ground of idiocy, or lunacy, are entitled to succeed in the same manner as legitimate children, to the real and personal estate of the parent, who was of sound mind.(6)

It may be observed, upon these provisions, *first*, that by the general section, (the 4th,) the marriage is not void *ab initio*, but only from sentence pronounced. Hence, the marriage in these cases is voidable only. In England, insanity renders the marriage void from the beginning.(7)

Again, it is a settled principle, that in all cases of a merely voidable marriage, the jurisdiction of the ecclesiastical courts ceases with the life of either of the parties.(8)

The above provisions, extend this right in certain cases, for the life-time of the other party.

4 Who may contest the validity of a marriage.

As to the interest which must exist, to entitle a party to apply, the following decisions have been made.

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(1) 2 R. S., 139, § 6.
(2) 2 R. S., 139, § 5.
(3) 2 R. S., 142, § 25.
(4) Ibid. § 27.
(5) Ibid. § 26.
(6) 2 R. S., 143, § 28.
(7) *Turner* v. *Myers*, 1 Hagg. Rep., 414, n.
(8) *Elliott* v. *Gun*, 2 Phillimore, 16. A case of an incestuous marriage, Poynter's Law of Divorce, 154, n. 6.

A remainder-man may institute such a suit, heirs presumptive,(1) or any one whose interests under wills, powers of appointment, &c., may be affected by the marriage.(2)

By the ecclesiastical law, such persons may intervene at any stage of a cause, appeal against a sentence, or, if too late to appeal at the time of the intervention, may institute a new suit.(3)

This latter right is restricted, however, by the Revised Statutes, (2 R. S., 144, § 37,) by which a sentence of nullity of marriage, if pronounced during the life-time of the parties, shall be conclusive evidence of the invalidity of the marriage in all courts and proceedings, but if pronounced after the death of either of the parties to the marriage, it shall only be conclusive as against the parties to the suit, and those claiming under them.

A father of a lunatic who is of age, cannot, in England, institute such a suit, being neither committee nor guardian *ad litem*. He can only do so by showing an interest.(4) Under our statute of Descents, he would be, in many cases, entitled as presumptive heir.

5
Force or fraud.

A marriage may be annulled, on the ground that the consent of one of the parties was obtained by force or fraud during the life-time of the parties, or one of them, on the application of the party whose consent was so obtained, or of the parent or guardian of such party, or of some relative interested, to contest the validity of the marriage.(5)

If, however, it shall appear, that at any time before the commencement of the suit, there was a voluntary cohabitation of the parties as husband and wife, the marriage cannot be annulled on this ground.(6)

If there is any issue of such a marriage, the court shall decree the custody of the children to the innocent parent, and

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(1) See Poynter's Law of Divorce, p. 161, and notes.

(2) *Faremouth* v. *Watson*, 1 Phill., 355. The sister of the husband in an incestuous marriage, had an interest under the will of the mother, contingent upon the brother dying without lawful issue. The nullity was pronounced on her application. The court said that a slight interest was sufficient to enable a party to bring such a suit.

(3) Poynter on Marriage and Divorce, 261.

(4) *Turner* v. *Myers*, 1 Haggard, 414, *n*.

(5) 2 R. S., 143, § 36.

(6) Ibid. § 31.

may also decree a provision for their education and maintenance out of the estate and property of the guilty party.(1)

6 Physical incapacity.

A suit to annul a marriage on the ground of physical incapacity, can only be maintained by the injured party against the party whose incapacity is alleged, and shall in all cases be brought within two years from the solemnization of the marriage.(2)

The rule in the ecclesiastical courts of England is, that there must be three years cohabitation before a suit can be sustained, excepting in cases of a plain and irremediable imperfection. There is a marked contrast between our statutory provision, and this rule of the English courts. If our legislature judges most practically, viewing the matter as a mere question of evidence, the canon law seems to have the advantage, upon the point of delicacy.

Puffendorf makes a question, whether we can properly call it matrimony, when an ancient couple are linked together, without any prospect of a blessing from the bed.(3) The rule of law, and the maxims of propriety, seem well expressed in a passage from the Rituals of Boulogne, Soissons, &c., quoted by Mr. Poynter.(4) It must be established that the incompetency existed at the time of the marriage, and that it still remains without remedy.(5)

There was a case in England, in which the husband sought to have the marriage annulled on the ground of his own impotency. The libel was dismissed. *Norton* v. *Seton*, called *Norton*, 1820.(6)

It appears from the authorities cited by Mr. Poynter, especially that from Sanchez, that such a suit may be promoted, if

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(1) 2 R. S., 143, § 32. (2) Ibid. § 33.

(3) Puffendorf, Book 6, cap. 1, 25. He says, however, that in most commonwealths these matches are tolerated, inasmuch as the other end of matrimony, mutual assistance and comfort, will hold as strongly here as in any other case.

(4) A l'êgard des vielliards qui quoique d'un age trés avancé, sont néanmoins en état, de donner un consentement libre et volontaire au marriage, un curé nest point en droit de les en exclure; mais il doit communement tacher de les en detourner, sourtout lorsqúils veulent espouser de jeunes personnes; l'experience faissant connoitre que ces sortes des marriages sont souvent la source d'une infinite de désordres.

(5) Poynter, p. 125. (6) 3 Phillimore, 147.

the husband was ignorant of his defect at the time of marriage. The case of *Norton* v. *Norton*, may be put upon the ground of knowledge, but the language of our statute seems wholly to exclude such a question.

See also on this subject, *Briggs* v. *Morgan*, 3 Phill., 327, and *Tollard* v. *Wyboame*, 1 Haggard, 728.

In the case of *Valleau* v. *Valleau*, 6 Paige, 211, it was held that the true construction of the 3d subdivision of the 42d section of the article was, that if the complainant knows that his wife has contracted a second marriage, and continues openly to cohabit with such second husband, or that she is living in open and continued adultery with another person, even without the usual form of a marriage, the right to file a bill for a divorce for such adultery will be barred after the expiration of five years, although such cohabitation or adulterous intercourse is continued down to the time of the commencement of the suit.

If the wife, after the husband has abandoned her, and been absent more than five years, marries a second husband, the first husband cannot obtain a divorce on the ground of adultery with the second husband subsequent to such marriage, unless he can establish the fact, that at the time of the second marriage, the wife knew that her first husband was living within five years then next preceding.(1)

To authorize a sentence of nullity on the ground of impotence, it is necessary for the complainant to establish the fact of the existence of the alleged incapacity at the time of the marriage, and that such incapacity still continues, and is incurable. This is the construction of our statutory provision, as well as the law of England.(2)

For the form of an order in a case of alleged impotence, see Appendix, No. 313.

In *Devanbagh* v. *Devanbagh*, 6 Paige, 176, the suit was to annul the marriage on the ground of impotency of the defendant. An order of reference had been made to a master, to take proof of the allegations, and to examine the defendant on oath. Upon the coming in of the report, the chancellor held,

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(1) *Valleau* v. *Valleau*, 6 Paige, 207.

(2) *Devenbagh* v. *Devenbagh*, 5 Paige, 557.

that where there was reason to believe that a slight surgical operation would remove the incapacity, the court could not pronounce a sentence of nullity.

7 Proofs how taken.

It was before observed, that the 45th section of the act, (2 R. S., 175,) prescribes that issues upon the legality of a marriage should be tried by a jury, except the case where the marriage is sought to be annulled on the ground of physical incapacity. I presume, therefore, that in such a case, if the allegations are denied, proofs are to be taken before the examiner, or if the bill is taken as confessed, by a master under the 164th rule.(1)

Suits to annul a marriage, on any ground, are to be by bill, and conducted in the same manner as other suits prosecuted in this court, which has the same power to award issues, decree costs, and enforce its decrees, as in other cases.(2)

Hence the practice is, as stated in the former volume of this work, with the following modifications.

8 Reference.

Where this bill has been taken as confessed, or the facts charged therein are admitted by the answer, the complainant may apply to the court on any regular motion day, or in term, upon due proof of the regularity of the proceedings, to take the bill as confessed, or upon the bill and answer, for a reference to the master, to take proof of all the material facts charged in the bill, and to report such proof to the court, with his opinion thereon.(3)

This form of an affidavit of regularity in a mortgage cause, (Appendix, No. 314,) will suffice in the present case.

This reference is necessary, in consequence of the provision of the 34th section of the statute, (2 R. S., 144,) that no sentence of nullity shall be pronounced solely upon the declarations or confessions of the parties; but the court shall, in all cases, require other satisfactory evidence of the existence of the facts on which the allegation of nullity is found. This is in conformity with the previous course of the court. Confessions and declarations are still admissible, but must be supported by other proof.(4)

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(1) *Devanbagh* v. *Devanbagh*, 5 Paige, 554.

(2) 2 R. S., 144, § 35. (3) Rule 164.

(4) See Office, &c., Master in Chancery, page 174—and especially the passage from Clarke's *Praxis in curiis Ecclesiasticis*.

The master, it is to be noted, must report the proofs taken by him, as well as his opinion thereon.

And in the case of a bill upon the ground of nonage, an affidavit must be produced, showing that the parties have not freely cohabited for any time as husband and wife, after the complainant had obtained the age of consent.(1) This, I presume, must be made by the complainant. But if the bill is to be sworn to, it should contain this allegation, and then I presume an affidavit would be unnecessary.

9 Dismissal of bill in other cases.

If the bill is to avoid the marriage on any ground but that of physical incapacity, and the material allegations are denied in the answer, and no replication is filed in due season, the defendant on due notice, may apply to have the bill dismissed.

10 Issue.

If a replication is filed, either party without entering any order to produce witnesses, may, on the usual notice to the adverse party, apply for a feigned issue.(2) For the proceedings upon a feigned issue, in case of adultery, (see post. § II, sub.)

Any matter which would be a bar to the annulling of the contract may be set up in the answer, and if an issue is taken upon it, it shall be tried at the same time, and in the same manner as other issues of fact in the cause.(3)

11 Hearing.

No decree of nullity can be made, of course, by the default of the defendant, or in consequence of any neglect to appear at the hearing, or by consent. The cause must be heard after the trial or upon the coming in of the master's report, at a stated term of the court (4)

12 Sentence.

For the form of a sentence declaring the nullity of a marriage, see Appendix, No. 315.

If the sentence is pronounced during the life-time of the parties, it is conclusive evidence of the invalidity of the marriage in all courts and proceedings; but if pronounced after the death

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(1) Rule 168. 2 R. S., 142, § 21.

(2) Rule 167. 2 R. S., 175, § 45. By this section, all issues upon the legality of a marriage, (except where the ground is physical incapacity,) shall be tried by a jury of the country, and the chancellor shall award a feigned issue for the trial thereof.

(3) Rule 168.

(4) Rule 170.

of either of the parties to the marriage, it shall only be conclusive evidence as against the parties in the suit, and those claiming under them.(1)

SECTION II.

DIVORCES DISSOLVING THE MARRIAGE CONTRACT.

ADULTERY.

1 Cases in which a divorce may be decreed.

A divorce may be decreed, and marriages dissolved, whenever adultery has been committed by husband or wife, in the following cases.

1. Where both husband and wife were inhabitants of this state, at the time of the commission of the offence.

2. Where the marriage has been solemnized, or has taken place within this state, and the injured party, at the time of the commission of the offence, and at the time of exhibiting the bill of complaint, shall be an actual inhabitant of this state.

3. Where the offence has been committed in this state, and the injured party, at the time of the exhibiting the bill of complaint, is an actual inhabitant of this state.

It will be noticed, that there is a variation in the present form from the former act. By a clause of the first section of that act, the party injured was to be a *resident*, where the marriage had been solemnized in the state. The term inhabitant is now used throughout. See upon this subject the authorities collected, Office and Duties Masters in Chancery, 170, 173. It is probable that the case of *Williamson* v. *Parisien*, 1 Johns. C. R., 392, furnishes the rule of construction upon each of the subdivisions of the section.

If the bill is by a wife, and she resides in the state, she shall be deemed an inhabitant thereof, although the husband reside elsewhere.(2)

2 Bill by a wife.

A bill for a divorce may be exhibited by a wife in her own

(1) 2 R. S., 143, § 37.

(2) 2 R. S., 148, § 57.

name, as well as by a husband.(1) It is settled, that this provision extends only to the cases of a divorce sought on the ground of adultery. If the bill is for a limited divorce, the wife must sue by a next friend.(2)

3 Oath necessary.

The bill, whether filed by husband or wife, must be verified by oath, in the usual manner of verifying bills.(3) And the complainant must positively aver that the adultery charged was committed without his consent, connivance, privity or procurement; that five years have not elapsed since he discovered the fact that such adultery had been committed; and that he has not voluntarily cohabited with the defendant since the discovery of such adultery.(4) For the form of a bill, see Appendix, No. 316.

The answer may in all cases be without oath or affirmation.(5)

4 Admission of charge. Reference.

If the adultery be admitted, or the bill be taken as confessed, the court shall refer the matter to a master, with directions to take proof of the matters charged, and to report the same to the court, with his opinion thereon, and the cause shall be heard on such proof and report, before any final decree shall be pronounced.(6)

After the order is entered to take the bill as confessed, or the answer is filed admitting the facts charged, a motion may be made on any motion day, or in term, for an order of reference.(7)

If the bill is taken as confessed, there must be made and read on the motion, an affidavit of the regularity of the proceedings.(8) See the order of reference, No. 317.

5 Denial of charge, and matters of defence.

If the material allegations in the bill are denied by the answer, and no replication is filed within the time allowed by the rules of the court, the defendant, on due notice, may apply to have the bill dismissed.(9)

If a replication is filed, either party, without entering any

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(1) 2 R. S., 144, § 37.
(2) *Wood* v. *Wood*, 2 Paige, 454; 8 Wendell, 357.
(3) Rule 163.
(4) Ibid.
(5) 2 R. S., § 39.
(6) 2 R. S., § 41.
(7) Rule 164.
(8) Ibid.
(9) Rule 167.

order to produce witnesses, may, on the usual notice to the adverse party, apply for a feigned issue.(1)

It is provided by statute, that if the offence charged be denied, an issue is to be made up for the trial of the facts contested by the pleadings, by a jury of the country at some circuit court.(2) The court may direct a special jury to be struck, and may make the necessary orders for procuring a list of jurors, and for striking the same.(3)

See the orders for a feigned issue, Appendix, No. 317, and of the issue itself, No. 318.

The defendant may, in the answer, set up the adultery of the complainant, or any other matter which would be a bar to a divorce.(4) The answer may include a denial of the charge of adultery, and an allegation of the adultery of the complainant, or a condonation of the offence.(5) If the adultery of the complainant has not been discovered, or has not been committed until after the answer of the defendant has been filed, the court will permit the defendant to file a supplemental answer, or a cross bill, to set up such defence.(6)

6 Issue.

If an issue is taken upon a defence set up in the answer, such as a condonation, or the adultery of the complainant, it shall be tried at the same time, and in the same manner as other issues of fact in the cause.(7)

The court may award a new, or further trial of the issues, as often as justice shall require.(8)

For the proceedings upon the issue, and other points of practice connected with it, see this Treatise, Vol. I., p. 502.

7 Decree.

No decree can be pronounced, as of course, upon the default, or in consequence of any neglect to appear at the hearing of the cause, or by consent. The cause must be heard after the trial of the feigned issue, or upon the coming in of the master's report, at a stated time of the court.(9)

Where no one appears on the part of the defendant, the details of the evidence in adultery cases shall not be read in public, but shall be submitted to the chancellor in open court.(10)

For the form of a decree, see Appendix, No. 319.

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(1) Rule 167. (2) 2 R. S., 145, § 38. (3) Ibid.
(4) Rule 168. (5) *Wood* v. *Wood*, 2 Paige, 108.
(6) *Smith* v. *Smith*, 4 Paige, 432. (7) Rule 168.
(8) 2 R. S., 145, § 40. (9) Rule 170. (10) Ibid.

It is usual to insert in the decree a clause, that the defendant may not marry again until the death of the complainant, but that the complainant is at liberty to marry again during the life of the defendant. This is in pursuance of the 47th section of the statute. (2 R. S., 146.)

When divorce may be refused, the adultery being proven.

8 Although the fact of adultery is established, the court may deny a divorce.

1st. Where the offence shall appear to have been committed by the procurement, or with the connivance of the complainant. 2d. Where the offence charged shall have been forgiven by the injured party, and such forgiveness shall be proven by express proof, or by the voluntary cohabitation of the parties, with knowledge of the fact. 3d. Where the suit shall not have been brought within five years after the discovery by the complainant of the offence charged. And, 4th. Where it shall be proved that the complainant has also been guilty of adultery, under such circumstances as would have entitled the defendant, if innocent, to a divorce.(1)

As to the first case, where the offence has been committed by the procurement, or with the connivance of the complainant, it is presumed that *procurement* is used in the statute as synonymous with collusion as understood in the ecclesiastical law; viz., where there is an agreement for one party to commit the adultery, so as to suffer the other to obtain the remedy.(2)

Connivance, by the same law, is acquiescence in the offence, after knowledge of it has been obtained, with the expectation that the guilt will be renewed. It is to be proved by a train of conduct and circumstances. On the part of the husband, matrimonial cohabitation after knowledge is connivance.(3)

Connivance, in the acceptation of that law, differs from condonation. The latter may be meritorious; connivance involves criminality. It seems to involve acquiescence in future anticipated guilt, as well as in the past.(4)

As to the case of forgiveness, or condonation, it has been

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(1) 2 R. S., 145, § 40.

(2) *Creeve* v. *Creeve*, 3 Haggard, p. 130.

(3) *Rogers* v. *Rogers*, 3 Hagg. Rep., p. 58. *Moorsom* v. *Moorsom*, 3 Hagg., 105. *Hodges* v. *Hodges*, Ibid. 119.

(4) *Turton* v. *Turton*, 3 Hagg., 356.

held, that although the offence has been forgiven, (either expressly or impliedly from cohabitation with knowledge of the fact,) yet if the same offence, or one of the same class is repeated, the condonation is at an end, and the right to the divorce is revived.(1)

It is a question, whether subsequent cruel treatment will be sufficient to revive a condoned adultery.

In the case of *Johnson* v. *Johnson*, the vice-chancellor of the first circuit held, that subsequent ill treatment by the husband, revived a condoned adultery. (See 1 Edwards' Rep. 439.) Upon an appeal, the chancellor admitted this to be the English rule, but considered it not to prevail in our state, and to be inapplicable to our system as to divorces. He also considered that supposing the rule to prevail, there was not ground sufficient to apply it in the case before him. (4 Paige, 460.)

The cause was carried to the court of errors. (14 Wendell, 637.) Chief Justice Savage was very decided in the opinion, that subsequent ill treatment would revive the right to sue for the divorce. Senator Tracy supported the views of the chancellor. The decree was reversed by a vote of 11 to 9. The reporter adds, that upon settling the decree, senator Kemble stated, that he had voted for reversal on the ground that a condonation had not been established by the proofs in the cause, and had not examined the question of a revival. The reporter adds, that the question must be considered undecided, the opinion of the vice-chancellor having the support of the chief justice, justice Neilson, and nine senators, and that of the chancellor, of senator Tracy, and eight senators.

A defendant may deny the adultery charged, set up a forgiveness, and allege acts of adultery by the complainant as a *compensatio criminis* in the same answer.(2)

The same jury may be directed to inquire into all these matters.(3)

9 Legitimacy.

If the wife is complainant, the legitimacy of any children of the marriage, born or begotten of her before the filing of the bill, shall not be affected by the decree of dissolution.(4)

And if the husband is complainant, the legitimacy of chil-

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(1) *Smith* v. *Smith*, 4 Paige, 432. *Johnson* v. *Johnson*, Ibid. 469.
(2) *Smith* v. *Smith*, 4 Paige, 434. (3) Ibid.
(4) 2 R. S., 145, § 41.

dren, born or begotten before the commission of the offence charged, shall not be affected by the decree.(1) The legitimacy of other children of the wife, may be determined by the court upon the proofs in the cause.(2) In every such case, the legitimacy of all children begotten before the commencement of the suit shall be presumed, until the contrary shall be shown.(3)

In the case of *Cross* v. *Cross*, 3 Paige, 140, the chancellor stated, that it was the duty of the court, to examine the proofs as to alleged illegitimacy with the most rigid scrutiny, in order to prevent the rights of innocent children from being sacrificed by the misconduct or negligence of their parents. The chancellor also cites and approves of the decision in the *Banbury* case. 1 Sim. & St. Rep., 153.

He also held, that the admissions of the wife, as to the bastardy of a child, could not be received—although as to her own guilt they might be, in connection with other satisfactory proof.

If the husband would question the legitimacy of any of the children of his wife, the allegation that they are, or that he believes them to be illegitimate, must be distinctly stated in the bill.(4)

If a reference is ordered, the master is to take proofs, and report his opinion upon the question of legitimacy, as well as upon the other matters of the bill ;(5) and if a feigned issue is awarded, an issue on the question of legitimacy of the children shall be awarded and tried at the same time.(6)

10 Disposition of children.

If a wife be complainant, and a decree of dissolution be pronounced, the court may make a further order or decree, compelling the defendant to provide for the maintenance of the children of the marriage, and to provide such allowance to the complainant for her support, as the court shall deem just, having regard to the circumstances of the parties respectively.(7)

11 Effect of decree as to the property of the wife.

If a wife be complainant, and a decree dissolving the marriage be pronounced, and she is the owner of any real estate, or has in her possession any goods or things in action, which were left with her by her husband, acquired by her own industry, given to her by devise or otherwise, or to which she may be entitled by the decease of any relative intestate, all such real

(1) 2 R. S., 145, § 42. (2) Ibid. (3) Ibid.
(4) Rule 169. (5) Ibid. (6) Ibid.
(7) 2 R. S., 145, § 43.

estate, goods or things in action, shall be her sole and absolute property.(1)

And if the husband be complainant, and such a decree be pronounced, the right of the complainant to any real estate owned by the defendant at the time of pronouncing the decree, in her own right, and to the rents and profits thereof, shall not be taken away or impaired by such dissolution of the marriage; and he shall also be entitled to such personal estate and things in action as may belong to the defendant, or be in her possession at the time such decree shall be pronounced, in like manner as though the marriage had continued.(2)

12 Dower.

A wife being a defendant in a suit brought by her husband, and convicted of adultery, shall not be entitled to dower in her husband's real estate, or any part thereof, nor to any distributive share of the personal estate.(3)

SECTION III.

LIMITED DIVORCES.

A separation from bed and board for ever, or for a limited time, may be decreed by the court on the complaint of a married woman, in the following cases:—

1 Jurisdiction.

1st. Between any husband and wife, inhabitants of the state. 2d. Where the marriage shall have been solemnized, or shall have taken place within the state, and the wife shall be an actual resident at the time of exhibiting her complaint. 3d. Where the marriage shall have taken place out of the state, and the parties have become and remained inhabitants of the state at least one year, and the wife shall be an actual resident at the time of exhibiting her complaint.(4)

By an act, passed in 1824, (Ch. 205, § 12,) it was declared lawful for the court to extend the same rights to husbands that are given to *femes covert*, by the 10th and 11th sections of the act concerning divorces, &c., and to grant to the husband the same relief, for the like causes as *femes covert* are entitled to,

(1) 2 R. S., 146, § 44.
(2) Ibid. § 45.
(3) Ibid. § 46.
(4) Ibid. § 48.

under the act aforesaid. In the case of *Perry* v. *Perry*, 2 Paige, 506, it was decided, that this section still continued in force.

Such separations may be decreed for the following causes:— 1st. The cruel and inhuman treatment by the husband of his wife. 2d. Such conduct, on his part, towards her, as may render it unsafe and improper for her to cohabit with him. 3d. The abandonment of the wife by the husband, and his refusal or neglect to provide for her.(1)

The bill of the complainant, in every case, must specify particularly the nature and circumstances of the complaint on which she relies, and shall set forth times and places with reasonable certainty.(2) See the form, Appendix, No. 320.

2 Next friend of wife.

The wife cannot file this bill in her own name. She must unite with some one as her next friend. If the bill is filed in her own name, the defendant may demur.(3)

The next friend must be worth two hundred and fifty dollars over and above his debts.(4) The objection to his sufficiency may be taken upon a motion to remove him, as in *Lawrence* v. *Lawrence*, 3 Paige, 269, or upon an application to stay proceedings until a proper next friend should be appointed, or security for costs given, as in *Robertson* v. *Robertson*, 3 Paige, 387. The wife, in a proper case, may be authorized to sue in *forma pauperis*. But the court will first ascertain that she has probable cause for filing the bill.

3 Oath to bill.

The bill must be verified by oath, in the usual manner of verifying bills where an oath is required.(5)

In the case of *R*—— v. *R*——, 1835, counsel feeling some uncertainty by whom this oath should be taken, a *jurat* was annexed for both the wife and next friend. See Appendix, No. 324.

4 Defence.

The defendant may be permitted to prove, on his justification, the ill conduct of the complainant, and on establishing such defence to the satisfaction of the court, the bill shall be dismissed.(6)

5 Reference.

If the bill is taken as confessed, or the facts charged are admitted by the answer, the complainant may apply on any regu-

(1) 2 R. S., 147, § 49. (2) Ibid. § 50.
(3) *Wood* v. *Wood*, 2 Paige, 454. 8 Wendell, 357.
(4) *Robertson* v. *Robertson*, 3 Paige, 387.
(5) Rule 163. (6) 2 R. S., 147, § 51.

lar motion day or in term, upon due proof of the regularity of the proceedings to take the bill as confessed, or upon the bill and answer, for a reference to a master to take proof of the material facts charged in the bill, and to report such proof to the court, with his opinion thereon.(1) See the form of the order, Appendix, No. 322.

The master, upon such a reference, may take the examination of the complainant on oath, as to any cruel or inhuman treatment alleged in the bill which took place when no witnesses were present, who are competent to testify to the facts on such reference.(2)

If the allegations of the bill are denied, proofs are taken before an examiner, unless an issue is applied for, in the usual course of the court.

6 Decree.

The 170th rule applies also to limited divorces. No decree can be made merely upon the default of the defendant, or in consequence of any neglect to appear at the hearing of the cause, or by consent.

The cause must be heard at a stated term of the court, after the trial of the issue, or upon the coming in of the master's report.(3)

Upon decreeing a separation, the court may make such further decree as the nature and circumstances of the case may require, and may make such order and decree for the suitable support and maintenance of the wife and her children, or any of them, by the husband, or out of his property, as may appear just and fit.(4)

And even where a decree of separation from bed and board is not made, the court may make such order or decree for the support and maintenance of the wife and her children, or any of them by the husband, or out of his property, as the nature of the case renders suitable and proper.(5)

When a decree of separation for ever, or for a limited time, shall have been pronounced, it may be revoked at any time thereafter, by the same court by which it was pronounced, under such regulations and restrictions as the court may impose, upon the joint application of the parties, and upon their producing satisfactory evidence of their reconciliation.(6)

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(1) Rule 164. (2) Rule 166. (3) Rule 170.
(4) 2 R. S., 147, § 52. (5) Ibid. § 53. (6) Ibid. § 54.

In the case of *Colvin* v. *Colvin*, 2 Paige, 385, a decree had been made upon a bill by the husband, dissolving the marriage contract on the ground of adultery. After the decree was enrolled, both parties joined in a petition to the court, requesting that the enrolment might be opened and vacated; that the decree might be reversed, and the parties restored to the rights which they had formerly enjoyed, and that the bill and other papers might be taken from the files, and destroyed.

The chancellor determined, that after this decree had been regularly entered, no order could be made to affect the rights of third persons, acquired under the decree. A sale, for example, of property by one, in which but for the decree the other should have joined, must be protected. The application to take the papers off the file was therefore denied. The other part of the prayer of the petition was allowed, and an order was made opening the enrolment, vacating the decree, and directing the bill to be dismissed, without prejudice to the rights of any persons acquired under the decree. The papers and proceedings were ordered to be sealed up, and not to be copied or inspected but by the special permission of the court.

In this case, the principle of the statutory provision was applied to a case of adultery.

7 Control of children.

In a suit by a wife, either for a divorce or a separation, the court may, during the pendency of the cause, or at its final hearing, or afterwards, as occasion may require, make such order as between the parties, for the custody, care, and education of the children of the marriage, as may seem necessary and proper, and may at any time thereafter annul, vary, or modify such order.(1)

In the case of *Graves* v. *Graves*, 2 Paige, 62, the bill, which was for a divorce on the ground of adultery, was taken as confessed—a report of the truth of the allegations was obtained—and a decree dissolving the marriage contract was pronounced. The chancellor referred it to a master, to ascertain and report which of the parties ought to have the care and custody of the children of the marriage; and if he should award the custody of them, or either of them, to the wife, he should also report what sum the defendant should pay to the complainant for their maintenance, and when, and in what manner. He was also to

(1) 2 R.S., 148. § 57.

ascertain whether any and what allowance should be made to the complainant for her own support, and when and how the same ought to be payable; and what security should be given by the defendant for the payment of such sums as should be fixed by the master for the maintenance of the children, or for the support of the complainant.

Costs, and a counsel fee, may be allowed to the wife upon her obtaining a decree.(1)

8. Enforcement of orders for support.

Whenever the court shall make an order or decree, requiring a husband to provide for the maintenance of his children, or for an allowance to his wife, the court may require such husband to give reasonable security for such maintenance and allowance. Upon his neglect or refusal to give such security, or upon the default of himself and his surety to pay the amount, the court may sequester his personal estate, and the rents and profits of his real estate, and may appoint a receiver, and apply the funds towards such maintenance and allowance.(2)

SECTION IV.

ALIMONY AND EXPENSES.

1. Expenses of suit.

In every suit brought, either for a divorce or for a separation, the court may in its discretion, require the husband to pay any sums necessary to carry on the suit, during its pendency; and it may decree costs against either party, and award execution for the same, or it may direct such costs to be paid out of any property sequestered, or in the power of the court, or in the hands of a receiver.(3)

This provision relates only to the costs and expenses of the suit. However, by the settled course of the court, probably recognised in the 58th section of the statute, an allowance for support *pendente lite* is constantly made.

The mode of obtaining an allowance for either support or

(1) *Graves* v. *Graves*, *ut supra*.
(2) 2 R. S., 148, § 58.
(3) Ibid. § 56.

costs, is usually by a petition. It is usual to unite the applications.(1) See the form, Appendix, No. 323.

So far as the application relates to costs, the court will generally determine upon the affidavits, showing what is the amount of the property of the husband, or his circumstances, and the nature of the suit.(2)

The question of the wife's guilt will not be entered into in settling this allowance, by hearing conflicting affidavits.(3) She must, however, in her petition for an allowance, deny the adultery, unless she has answered under oath, and denied it in her answer.(4)

In *Wood* v. *Wood*, 2 Paige, 115, the court allowed $150 for expenses of the suit; in *Osgood* v. *Osgood*, (Ibid. 621,) $100 was allowed by the court below: the order was reversed, but upon other grounds than the amount. *Lawrence* v. *Lawrence*, (3 Paige, 267,) $50 was directed to be advanced.

2 Alimony during suit.

The court, in general, directs a reference to a master, to examine and report what would be a reasonable sum to be allowed for the support of the wife, (and children, if left with her,) during the suit. See the order, Appendix, No. 324.

For the proceedings before the master, see Office, &c., Masters in Chancery, p. 167, &c., where the general rules of the court and several authorities from the ecclesiastical courts are stated.

In the case of *Lawrence* v. *Lawrence*, 3 Paige, 270, the chancellor entered at large upon these rules, and stated that the allowance was in the discretion of the court; that in fixing it, the court should take into consideration the nature of the husband's means, the situation of the parties in society, the amount of his income, and whether it is derived from property, or from his own personal and daily exertions. The fact must also be regarded, whether there are children or other relatives of the husband who have claims upon him for sustenance or education. He also declared that the alimony which is allowed pending suit, is always in a much smaller proportion than that which is assigned to her, as a permanent provision, after she has

(1) As in *Osgood* v. *Osgood*, 2 Paige, 621.
(2) *Osgood* v. *Osgood*, *ut supra*. *Wood* v. *Wood*, 115.
(3) *Wood* v. *Wood*, 2 Paige, 114. *Osgood* v. *Osgood*, Ibid. 621.
(4) *Osgood* v. *Osgood*, *ut supra*.

established the fact of such misconduct, as to entitle her to a divorce or separation.

The details of this case should be carefully examined by a master, in passing upon the question of an allowance for alimony. If it appear upon the face of the bill itself that no decree can be obtained, the court will not allow alimony.(1)

In *Germond* v. *Germond*, 4 Paige, 643, the chancellor held that the allowance for temporary alimony, should be estimated according to the expense of board and clothing at the place where the wife's connections reside, if she chooses that as the place of her residence, unless the expense of living there is disproportioned to the property of the husbond. The allowance should be limited to the actual wants of the wife until decree.

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(1) *Wood* v. *Wood*, 2 Paige, 454.

CHAPTER 34.

LUNATICS AND IDIOTS.

SECTION I.

TO OBTAIN A COMMITTEE.

1 Jurisdiction. THE care and custody of all idiots, lunatics, and persons of unsound mind, as well as of their real and personal estate, is committed by statute to the chancellor. He is to provide for their safe keeping and maintenance, and for the maintenance of their families, and the education of their children, out of their personal estate, and the rents and profits of their real estate respectively,(1)

As to the source of the jurisdiction in England, see Collinson on Lunatics, Vol. I. p. 86. Shelford on Lunacy, p. 15.(2) *In re Fitzgerald*, 2 Sch. & Lefr. 438.

The statute, it will be observed, distinguishes three classes, viz., idiots, lunatics, and persons of unsound mind. The former term indicates incompetency from the birth; the second, an original capacity now lost or suspended; the latter phrase has been supposed by some to be synonymous with lunacy, but Lord Eldon and Chancellor Kent have treated it, as indicating a state distinguishable from the others, yet such as to make a commission proper. Chancellor Kent held the jurisdiction of the court to extend to a case, where from age, disease, or other cause, the party was so weak and imbecile, as to be unable to manage his affairs.(3)

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(1) 2 R. S., 52, § 1.

(2) This appears to me, to be the most valuable treatise upon the subject we have.

(3) *Lord Donegal's* case, 2 Vesey, Sen., 408. The *Earl of Portsmouth*, April, 1815, cited by Mr. Shelford. In the matter of *Barker*, 2

In some subsequent English cases, this court has refused to go to this extent. *In re Holmes*, 4 Russell's Rep., 182, the return was that the party was not a lunatic, but partly from paralysis, and partly from old age, his memory was so much impaired as to render him incompetent to the management of his affairs, and consequently of unsound mind.

The lord chancellor (Lyndhurst,) recognised Lord Eldon's doctrine, in *Ridgway* v. *Darwin*, (8 Vesey, 66,) that cases might be proper for a commission, though falling short of insanity, but he suppressed the return, and issued a new commission, on the ground that the conclusion did not necessarily follow from the facts stated, and the facts found were not sufficient to justify the appointment of a committee.

In *ex parte Atkinson*, Jacobs' Rep., 333, the jury returned, that the party at the time of the return was a lunatic enjoying lucid intervals, and during such intervals was capable of governing himself, and administering his affairs. The return was quashed, and a new commission issued.

2 Petition.

The commencement of the proceedings, is by a petition for a commission in nature of a writ *de lunatico inquirendo*. For the form of the petition, see Appendix, No. 325.

It should be accompanied with affidavits, setting forth the

Johns. Ch. Rep., 232. In this case, Chancellor Kent examines all the authorities prior to his decision, and concludes, as stated in the text, that the inquiry might be, whether the party was mentally incapable of managing his affairs.

The order in the case also is in the alternative, "of unsound mind, or mentally incapable of conducting his affairs." The jury found that he was unsound, and incapable.

Chancellor Kent says, that a lunatic is one who has sometimes understanding, and sometimes not. And this is the definition of Sir William Blackstone, 1 Com., 304. But in practice, and under the language of the commission, lunatics are divided into those who have and have not lucid intervals. Numerous returns may be found, of the jury finding that the party is a lunatic, not enjoying lucid intervals. Such is the return in the precedent in Shelford, p. 632. In Collinson it is the reverse, that he does enjoy lucid intervals. The commission is, whether he is a lunatic, or enjoys lucid intervals. In *ex parte Ferne*, 5 Vesey, 540, an objection was taken to the return, for not stating whether he enjoyed lucid intervals or not. Lord Rosslyn overruled the objection, stating that he considered the return as having, not in express terms, but by implication negatived lucid intervals.

unsound state of mind of the party, stating some instances of conduct or language as plainly indicate it.

Lord Chancellor Hart, appears to have been very scrupulous as to granting a commission without strong preliminary proof. He required all the facts and evidence to be laid before him, and a case to be made of at least a probability of insanity.(1)

3 Persons who may apply.

The application may be made, by the attorney-general, on behalf of the people,(2) by a husband or wife; by any relation of the party; by an executor against a legatee under a will; by a trustee against a *cestui que trust;* and by creditors.(3)

A commission has also issued upon the petition of a tenant of the party;(4) and even strangers may obtain it, in opposition to the members of the family, where the lunacy seems indisputable.(5)

The carriage of the commission will, however, be given to relations in preference to strangers, if there is no valid objection to it, even where strangers apply, or a distant relative, and near relations object.(6)

Where there was a contest for the carriage of the commission between a person, who was the heir at law, and next of kin of the party, and his sister-in-law, in whose custody he had been for some time, but who was no relation in blood, the heir at law was preferred, as being most likely to secure the objects of the commission.(7)

4 Court not bound to issue a commission, though lunacy *prima facie* proven.

In *ex parte Tomlinson*, 1 Ves. & Bea., 58, the Lord Chancellor said, it had not been contended on either side, that the person exercising the office of lord chancellor is bound to issue a commission of lunacy whenever the fact of lunacy is esta-

(1) *Ex parte Persse*, 1 Molloy, 219. The Lord Chancellor said, that the mere issuing of a commission might produce consequences highly detrimental, and it is not to issue without great circumspection, the lord chancellor interposing, to give directions to physicians personally to visit the supposed lunatic, and afterwards to consult with them apart, it being almost the only case in which a judge was justified, and bound to use private means of obtaining information.

(2) 1 Collinson, 125. *In re McLean*, January, 1806, cited by Shelford, p. 93.

(3) 1 Collinson, 125. Shelford, 93. *Ex parte Ogle*, 15 Vesey, 112.

(4) Shelford, 93.

(5) *In re Smith*, 1 Russell, 348. The Lord Chancellor charged the costs of the opposition, upon the relations making it.

(6) *Tomlinson, ex parte*, 1 Ves. & Bea., 57.

(7) *In re Green*, April, 1821, cited Shelford, p. 94.

blished; that he should be sorry if he had to exercise such an authority, as by granting it, in many cases, he might for ever prevent a cure. The true point to consider in the exercise of this most delicate and important authority, is, whether it is really necessary for the benefit of the lunatic, with reference to his mental health, and his property, that a commission should issue. That he had occasion to consider the subject lately upon an application for a commission in the instance of a lady, who unquestionably was a lunatic. She was under the care of her husband, who opposed the application—not finding any thing in his conduct with reference to the care either of her person or property, which required his interposition, he had refused to grant a commission.

In *Sherwood* v. *Sherwood*, 19 Vesey, 286, the Lord Chancellor observed, that the person issuing the commission, ought at least to have a strong and high belief, that his judgment, should it be called in question, will be affirmed.

And Mr. Shelford says, (p. 82,) that where the application is opposed, or the lunacy is not apparent, the lord chancellor will make an order, before issuing the commission, for delivery of copies of the affidavits, to two physicians of his own nomination, for their perusal; that they have access to the party for the purpose of examination, and to certify to the lord chancellor the result, their opinions on his state of mind, and the ground on which they form such opinions. Mr. Shelford cites several cases, and says that there are numerous instances of similar orders.

5 Non-resident lunatic.

Before property, within this state, of a non-resident lunatic can be reached by this court, a committee must be appointed upon a regular commission. The commission cannot be executed beyond the limits of the state. It may be executed in such county as is most convenient. If his residence is near the line of the state, it should be executed in the adjoining county. Personal notice of the time and place of execution of the commission, must be given to the supposed lunatic.(1) The general rule in England is, to execute the writ at the mansion-house of the party, or where his property is situated.(2)

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(1) In the matter of *Pettitt*, 2 Paige, 174. *Perkins'* case, 2 Johns. Ch. Rep., 124.

(2) *Ex parte Southcot*, 2 Vesey, Sen., 401.

6 Order.

If the chancellor is satisfied that the case warrants a commission, an order is made, that a writ, in the nature of a writ *de lunatico inquirendo*, issue. See the form, Appendix, No. 326.

7 Commission.

And upon this order being entered, the register, &c. will seal a writ or commission. See the form, Appendix, No. 327. It is directed to three persons. More may be named if deemed requisite, but three may act.

An act was proposed in Parliament, in the year 1832, authorizing a commission to issue to one or more commissioners. (Shelford, 83, *n.*)

It is not of so much moment with us, where the fees are small, to reduce the number.

8 Place of execution.

Upon the death or incapacity of commissioners, a new commission may be issued.(1)

The general rule is, that the commission should be executed at the place of residence of the supposed lunatic.(2) Where the party had a town and country residence, both in the same county, the execution was directed to be had at or near either of the places, as the commissioners should think discreet.(3)

Mr. Shelford cites a case before Lord Brougham, (*In re Green*, April, 1831,) in which, on account of the convenience of witnesses, it was directed that the alleged lunatic be conveyed from London, where he had been for some time, to the place of his former residence, where the commission was ordered to be executed. As the general form of the order is, that the writ be executed at or near the residence of the party, care should be taken to vary the order in this respect, if the circumstances require it.

In re Waters, 2 Mylne & Craig, 38, a commission was directed to be taken in a county different from that nearest the abode of the party, to avoid the expense of carrying down medical witnesses from London: it was sent to Middlesex. And Lord Lyndhurst acted upon this rule, *In re Mills*, cited in the note.

9 Authority of the court pending the proceedings.

Before stating the proceedings under the commission, it may be useful to advert to the power of the court, to take measures for protecting the lunatic or his property during the investigation.

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(1) *In re Parker*, October, 1828. Shelford, 83.

(2) *Ex parte Baker*, 19 Vesey, 340. *In re Pettitt, ut supra.*

(3) *In re Jervis*, 14th August, 1829; Shelford, 96.

While the rule is fully recognised that the chancellor cannot permanently assume the custody of a supposed lunatic's person or estate, without the verdict of a jury, yet it has been held that he may temporarily interfere and take care of persons, as to whom a commission has been allowed, until a jury have passed upon the case.(1) Any order which will be necessary for the due execution of the commission, will, of course, be made; such as an order preventing the removal of the party out of the jurisdiction, before the writ is executed.(2)

10 Præcipe to sheriff.

The commission, and a copy of the order being left with one of the commissioners, (the first named,) he signs a *præcipe* to the sheriff of the county in which the writ is to be executed, directing him to summon a jury to inquire into the alleged lunacy. See Appendix, No. 328.

The time to be allowed in the *præcipe* is not prescribed. By analogy to the statute, as to summoning jurors before the circuit courts, six days' notice might be adopted as a general rule.(3) In New-York, the practice has been to fix a shorter period. It may be regulated by the convenience of the sheriff.

11 Notice to supposed lunatic. Examination of him.

The commissioners, are usually directed in the order, to give notice of the time and place of executing the commission, to the supposed lunatic. The party has a right to be present at the execution of the writ. The commissioners, or a jury, have a right to inspect and examine him.(4) The commissioners should take care that proof is made to them of the service of such notice.

If there are peculiar circumstances which render it improper or unsafe to give the notice, the facts should be brought before the chancellor upon the application, that the provision as to notice may be omitted.(5)

If a party who has the custody of the supposed lunatic, refuses to produce him, the court will make an order to compel

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(1) 2 Wilson & Shaw's Rep. House of Lords, 515.

(2) *Lady Marr's* case, Ambler, 82. *In re French*, cited by Shelford, 100, *n.*

(3) 2 R. S., 414, § 30.

(4) *Ex parte Southcot*, 2 Vesey, 405. In the matter of *Pettit*, 2 Paige, 174. In the matter of *Tracy*, 1 Paige, 582.

(5) Ibid.

him to do so, and upon disobedience will commit him.(1) The commissioners should issue a warrant for his production before them.(2)

An order may be obtained for allowing persons to have access to the lunatic, to enable them to oppose the petition.

In a case where a commission had been issued, the daughter of the alleged lunatic, and her husband, petitioned that they might have access to him, averring that he was of sound mind, and able to manage his own affairs. The lord chancellor ordered, that the petitioners and their solicitors, and medical advisers, should have access to the party at all seasonable times prior to, and during the execution of the commission; and the persons having the custody of the party, were restrained by order from interfering with, or interrupting the petitioners or their solicitors, or medical advisers, in such visits, and from removing, or concealing him.(3)

In the case of *ex parte Halsey*, cited in *ex parte Southcot*, 2 Vesey, Sen., 403, the commission was executed, and a committee appointed, where the mother of the party had taken him out of the kingdom, to avoid producing him.

Where a party had been brought before commissioners, and appeared rational, and before being brought up a second time had been allowed to drink freely, when from his altered conduct the jury believed him insane, the return was quashed.(4)

It is stated in *ex parte Smith*, (1 Swanston, 6,) to be a not uncommon practice where the lunatic cannot be removed to the jury, for one or two of them to examine him, and report their opinion to the others.

Mr. Shelford, (p. 101, *n.*) suggests the propriety of giving notice not only to the supposed lunatic, but also to some of his relations or friends, who are not concerned in the application.

12 Production of witnesses.

I do not know that the mode of compelling the attendance of witnesses before commissioners, has ever been settled in our court. It is stated by Mr. Maddock's, (p. 570,) and Mr. Shelford, (p. 103,) that the commissioners may sign and seal a

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(1) *Lord Wenman's* case, 1 P. Wms., 701. *In re Holmes*, 13th December, 1827. Shelford, 99.

(2) Collinson, 144.

(3) *In re Fletcher*, April, 1832. Shelford, 98.

(4) A case cited by Shelford, 100, from 1 Paris & Fonbl. Med. Juris., 294, *n.*

subpœna to be served upon them; a power they exercise, not under any positive provisions of an act of parliament, but by implication, and as necessary to enable them to execute the commission, the commissioners exercising the power which formerly belonged to the escheator or sheriff.(1)

As the power in our state resides in the court of chancery, not in the chancellor, or vice-chancellors, as special officers, I should presume, the ancient course of the court, where witnesses were to be brought before a master, would be proper. The *subpœna* was the same as to appear to a bill; and a label or ticket accompanied it, specifying the officer before whom the witness was to attend.(2)

In England, the administration is in virtue of a personal authority committed by the crown, not to the court of chancery, but to an officer of the crown, not necessarily the one who holds the great seal.(3) There is an instance of its being granted to the lord high treasurer by warrant.(4) The master of the rolls and vice-chancellor, have no jurisdiction in the matter.(5) See the form of the English *subpœna*, Appendix, No. 329.

13 Duty of sheriff.

The sheriff is to obey the directions of the commissioners in summoning the jury. He may, if so directed by the commissioners, guard the passage to the room where the jury are deliberating, to prevent any intrusion upon them. It is improper for him to be in the room with the jury, or to converse with them upon the subject before them.(6) Where a sheriff had thus interfered, the inquisition was set aside, and a new commission issued to a coroner.(7)

The commissioners are not authorized to make out a list of jurors to serve. This duty belongs to the sheriff. The commissioners may decide upon the validity of challenges to jurors.(8)

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(1) In *ex parte Lund*, 6 Vesey, 784, Lord Eldon, (in a case of bankruptcy, however,) said, that commissioners in lunacy came in the room of another authority, and were meant to have all the powers that authority had; and among these there is reason to say, it must be incident to the office of commissioner of lunatics to summon witnesses.

(2) *Parkinson* v. *Ingraham*, 3 Vesey, 607. This was amended by former rules. See rule 76.

(3) *Ex parte Grimstone*, 2 Vesey, Jr., 75, *n*. Ambler, 707.

(4) *Wigg* v. *Tiler*, 2 Dickens, 553.

(5) Shelford, 130.

(6) In the matter of *Arnhout*, 1 Paige, 498. (7) Ibid.

(8) In the matter of *Wager*, 6 Paige, 11.

14
Duty of commissioners.

I apprehend that the commissioners need not be sworn. There is no statutory provision or rule of court requiring it. Under commissions to take testimony, the commissioners are not sworn by our practice; the English oath of secrecy being adopted in the time of Lord Macclesfield. (See ante, Vol. I., p. 678, and *n.* 6.) So, Lord Redesdale shows, that commissioners in partition are not sworn, although in our state, there is a statute requiring it.

In relation to every legal question arising on the execution of the commission, a majority of the commissioners must decide.(1)

The commissioners, after the testimony is closed, should submit the question to a jury in the form of a charge, stating the law applicable to the case, and recapitulating the facts if necessary, but without arguments of counsel on either side. And the jury are to be instructed, that if twelve or more of them find that the party is not incompetent, they are to deliver their verdict accordingly; or if the same number decide against his competency, that they then find and determine the other facts directed to be inquired of; and that if twelve of them cannot agree either way, they report the fact to the commissioners, that their return may be made accordingly.(2)

15
Oath to jurors and witnesses.

One of the commissioners administers an oath to the jurors; and also swears the witnesses. Appendix, No. 330.

16
Inquiry as to property.

It will be noticed, that the commission directs an inquiry as to the property of the supposed lunatic.

Mr. Shelford observes, (p. 84,) that it has not been the practice in England, for thirty years past, to make particular inquiries before the jury respecting the heir at law, or the property of the lunatic; but these facts, as well as who are his next of kin, are subsequently ascertained and reported by the master, to whom the matter of the lunacy is referred, after the inquisition has been returned. The jury, generally, return their ignorance of these facts, as well as of the lands in which the lunatic has aliened.

I have acted in one case, in which the return was, that no evidence was laid before the jury, as to the property of the party.

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(1) In the matter of *Arnhout*, 1 Paige, 499. (2) Ibid.

17 Inquisition.

The agreement of twelve of the jurors is sufficient to justify a return. It is foreign to the plan of this work, to state minutely what return will justify the appointment of a committee. Some cases of insufficient returns are collected in the note. But if the jury can find that the party is of unsound mind, so as not to be capable of the government of himself and his property, it is sufficient.(1) For the form of an inquisition, see Appendix, No. 331.

The seals of the jurors must be set to it, and it is the usual practice for the commissioners to sign and seal it also.

The commissioners endorse a return upon the inquisition, Appendix, No. 332.

18 Mode of proceeding with, and setting aside inquisition.

The solicitor prosecuting the commission, then presents it to the chancellor, and usually accompanies it with a petition, for an order appointing a committee of the person and estate.

If the finding has been contested, the court will sometimes direct notice of this application to be given to the parties who opposed. Or, if a petition for liberty to traverse, or an issue, is presented, will hear the two together, where convenient.(2)

Any person who has opposed the commission, may take measures to prevent a committee being appointed, by petitioning for an issue.

The English course of allowing a traverse of the inquisition, does not prevail in our state. The practice is, to award an issue in its place.(3)

An issue may be obtained also after a committee has been appointed.(4) For the form of the order, and of the issue, see Appendix, Nos. 333, and 334.

The court will make a provisional order, pending the pro-

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(1) *Sherwood* v. *Sanderson*, 19 Vesey, 280. Cooper, 108. In this case, the verdict was, "that the person was not a lunatic, but of unsound mind, so that she is not sufficient for the government of herself, her manors, lands, &c." See *Dennis* v. *Dennis*, 2 Saund., 352. Returns, "that the person was not sufficient to manage his person and estate," (1 Atk. 160,) "not of sufficient understanding to manage her own affairs," (3 Atk. 169,) "not a lunatic, yet not proper to take care of his affairs during his fits," (2 Vesey, Sen., 405,) were respectively quashed. See also, *ex parte Holmes*, 4 Russell, 182, before cited.

(2) In the matter of *Christie*, 5 Paige, 242.

(3) *Wendell's* case, 1 Johns. Ch. Rep., 600. In the matter of *Tracy*, 1 Paige, 582.

(4) Ibid.

ceedings for the care of the lunatic's estate, and of his person.(1) See Appendix, No. 335.

The frame of the issue, and the proceedings upon, are regulated by the late act of our legislature, (Laws, 1839,) and the rule adopted upon it. See as to this, post, *Addenda*, No. 1.

19 Who may apply for an issue.

The party himself, or any of his family or relations, his alienee, or any person having an interest in his land or a party who has entered into a contract with him, may apply for an issue.(2) It seems that a mere stranger may not apply.(3) It is not usual to grant a traverse, or with us, an issue, until the chancellor, upon a private examination of the party, is satisfied that it is his wish to traverse, and that he is in a situation to present a petition for that purpose.(4)

This applies to the case of an application in the name of the lunatic himself. But where such was the application, and the chancellor was satisfied, it was in fact by a party a conveyance to whom was overreached, an issue was directed, upon that party filing a stipulation to be bound by the decision.(5)

SECTION II.

APPOINTMENT OF A COMMITTEE.

1 Petition.

It was before observed, that a petition is presented upon the return of the inquisition, for the appointment of a committee. See the form, Appendix, No. 336.

2 Order of reference.

Upon this, an order of reference is usually made to a master, to inquire and certify who is, or are, the most proper person or persons to be appointed committee or committees of the person and estate of the lunatic. Appendix, No. 337.

Notice is to be given to his heirs at law, and next of kin.

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(1) Matter of *Wendell*, 1 Johns. Ch. Rep., 603. *In re Frank*, August, 1825. *In re Chapman*, August, 1829. Shelford, p. 128, *n*.

(2) They may traverse in England. See *ex parte Merley*, 9 Vesey, 478. 2 Wilson & Shaw, appeal cases, 520.

(3) *Ex parte Ward*, 6 Vesey, 579.

(4) In the matter of Christie, 5 Paige, 242. (5) Ibid.

Our practice differs from the English in this point, that the inquiry as to the property of the lunatic, and the security to be given, is made part of the same order as the selection of a proper committee. In England, the master first reports his approval, and a petition is then presented for confirmation of the report, and the appointment of the committee and a reference back to the master, to inquire into the nature and amount of the lunatic's property, to settle a proper sum for maintenance; and the order also frequently directs that the costs of the application and of the inquiry before the master, shall be paid by the committee, and allowed on passing his accounts.(1)

I do not see why all these inquiries may not be embodied in one order. This is done in the Appendix, No. 338.

The court will, in a proper case, as where the property is small, and the evidence satisfactory as to qualifications, appoint a committee without a reference.(2) This has been frequently done in our court.(3)

The proceedings before the master, and the general rules governing his selections, are stated in Office, &c., Masters in Chancery, p. 147, *et seq.*

Whenever a person connected with the family can be found eligible, and willing to give the security, he ought to be appointed the committee.(4)

The heir and next of kin are entitled, of right, to propose themselves to the master for the charge of the person. In Ireland, it is held, that any other person must obtain an order for liberty to do so; and his petition, which should be presented promptly, should state the objections to the heir and next of kin, and set out particularly the facts on which he grounds his claim to be preferred.(5)

An heir at law will be required to give security as well as a stranger, unless the master report that no one can be found to act as committee who will give security.(6)

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(1) Shelford, 132.

(2) *Ex parte Farrow*, 1 Russell & Mylne, 112. *Ex parte* Lacy, 1 Collinson, 196.

(3) Some instances are cited by Mr. Moulton's Practice, Vol. III., p 511, *n.*

(4) Matter of *Hussey*, 1 Molloy, 226.

(5) Matter of *Persse*, 1 Molloy, 439.

(6) In the matter of *Frank*, 2 Russell, 450.

If the lunatic has a son of proper age, and in the country, and no objection exists to him, it is almost of course to appoint him committee of the estate.(1)

Persons whose places of residence admit of their frequently visiting the lunatic, and inspecting the management of his concerns, should be preferred as committees.(2)

A committee cannot be discharged without showing some valid excuse for resigning his trust. The fact, that his situation is unpleasant from controversies in the family of the lunatic, is not sufficient for that purpose.(3)

The custody of a female, unmarried, will be given in preference, to one of her own sex. But one person should, in general, be appointed committee of the person.(4)

Unless strong reasons exist to the contrary, the custody of a lunatic wife will be committed to the husband, and of a husband to the wife; but, in the latter case, the court appears disposed to unite some person, especially a medical man, with her.(5)

3 Report.

For the master's report, see Appendix, No. 339.

4 How objected to.

It is stated in the English books,(6) that a petition is to be presented, praying the confirmation of the report, and the appointment of the selected committee, with the other directions. This course has been pursued with us, although, generally, a motion has been made merely without a petition. And where there is no opposition or contest before the master, no objections can exist to it.

But where there has been a contest upon any point, the practice is not finally settled by rule or decision in our own court, within my knowledge. It seems to me, that by far the best course is, to pursue the general practice of filing the report, entering an order *nisi* to confirm it, giving notice, and driving the party to exceptions. By adverting to the 35th and 36th chapters of Mr. Smith's Practice, it will be seen, that some

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(1) Matter of *Lord Banger*, 2 Molloy, 518.

(2) *Ex parte Fermor*, Jacobs' Rep., 405.

(3) Matter of *Lytle*, 3 Paige, 251.

(4) *Ex parte Ludlow*, 2 P. Wms., 635.

(5) *Lord Wenman's* case, 1 P. Wms., 701. *Ex parte Huep*, 18 Vesey, 22.

(6) 2 Collinson, 157. Shelford, 132.

doubt in England still exists, as to what reports are proper for exceptions, and what can be rectified only by petition to review; or, a still more anomalous case, a petition for leave to except. A striking case is stated by him, (Vol. II. p. 367,) of the uncertainty of the practice, and the inconvenience of a petition, and the superior convenience of exceptions.

But the case of *Chennell* v. *Martin*, (4 Simons, 346,) seems to me, not only high authority, but as furnishing the simplest, and best rule. The vice-chancellor went far to explode the distinction between certificates and reports, saying he thought it clear that all a master's certificates were reports, and all his reports certificates. He enters critically into an examination of many cases, and concludes, that where the objection does not appear upon the face of a report, if the master reports or certifies adversely, the objection should be made to his report or certificate by exception, not by petition or motion; and that this course is directed by the general orders of the court.

Perhaps the only solid distinction between a certificate and report is, that upon the former, no action of the court is to be had; for example, a certificate of having expunged impertinent matter from a pleading, which act was heretofore performed by a master: a certificate of costs being taxed—appointment of a receiver, in which case, by a settled rule, the report is final, without application to the court. I do not recollect another case, in which something must not be done upon a master's report, or certificate, calling for the action of the court. In the present instance, the report is only of approval, and of a certain sum for an allowance. The appointment, and order for payment is yet to be made, founded upon the report.

5 Order of appointment.

For the form of the order appointing a committee, see Appendix, No. 340.

In general, the same person is appointed committee of the person and estate, though sometimes different committees are appointed.

The chancellor will make any order which may be necessary for securing proper attention to the lunatic. In one case, an order was made that a particular physician be requested to visit the lunatic at his residence, and to direct the medical treatment, and to report the state of her health, &c., and what

might be done for her health and comfort, having regard to her income.(1)

The committee will, of course, be removed for any misconduct upon a petition and sufficient affidavits, or an inquiry before a master.(2)

The committee, under the supervision of the chancellor, has the entire right to control the person of the lunatic, and to confine him if necessary. By the statute respecting the safe keeping of lunatics, the committee may provide a suitable place for the confinement of one furiously mad, or so disordered as to endanger his own person or that of others, and to confine and maintain him in such a manner as shall be approved by the overseers of the poor of the city or town.(3)

There are other provisions in the act which may apply; but none of them are to restrain or abridge the power of the chancellor concerning the safe keeping of lunatics, or the charge of their persons or estates.(4)

6 Maintenance.

The committee should have regard entirely to the care, comfort, and health of the lunatic. All of the income which is necessary will be applied, and the allowance upon any accession of fortune, will be increased. Next of kin, and expectants, are not to be regarded.(5)

The chancellor may also direct the children of the lunatic to be supported out of the estate, and orders have been made for the payment of sums for their advancement in life, and in discharge of their debts.(6)

In a case before the vice-chancellor of the first circuit, where the father of the lunatic was old and infirm, and had for many years been supported by him, the committee continued to advance moneys for his support and clothing, which were allowed on passing his accounts.(7) It is, however, most pru-

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(1) *In re Pearson*, November, 1828. Shelford, 143.

(2) Shelford, 193.

(3) 1 R. S., 634, § 1. (4) Ibid. p. 635, § 12.

(5) *Ex parte Chumley*, 1 Vesey, Jr., 296. *Ex parte Baker*, 6 Vesey, 8.

(6) *Foster* v. *Marchant*, 1 Vernon, 263. *In re Alderson*, 1808. *In re Jessup*, 1808, Shelford, 154. *In re Le Huep*, December, 1828.

(7) In the matter of *Sutton*, 1836. See 2 Merivale, 101. See several cases, (not elsewhere reported, Shelford, 155—162.

dent to get the previous sanction of the court for all such disbursements.

7 Duties of the committee.

As a general rule, the committee cannot enter into any transaction or contract respecting the property of the lunatic, without the authority of the chancellor, or vice-chancellor.(1) He cannot institute suits, and it is proper for him to apply for liberty to defend a suit. He should not reduce rents, without a previous order, which is usually made, if a master report it expedient. It will be referred to a master, to ascertain whether it is for the benefit of the lunatic to grant leases of mines belonging to him, or to complete a contract for a purchase of adjoining property, to exchange lands, to make repairs, or to rebuild messuages, whether a compromise of a claim would be advantageous, &c.

The passing of the accounts of a committee is governed by the 154th and 155th rules, copies of which, with forms of the annual accounts and inventory to be rendered by him, are to be furnished to the committee by the register, &c. These directions are so full and minute, that it is needless to detail the practice upon this subject. The filing of an inventory is required by statute.(2)

8 Superseding the commission.

A petition should be presented by the former lunatic, stating his recovery, and praying a *supersedeas*. It should come from him, and not from his relations.(3)

A personal attendance is usually directed, and strong affidavits should be furnished to the court made by medical men, or other competent persons, showing the restoration of a sound state of mind.(4)

In *ex parte M.* before the vice-chancellor of the first circuit, a commission had issued in 1832, and the party found a lunatic. In 1834, on the petition of his committee, a *supersedeas* issued. The petition was supported by the affidavits of the physician and warden of the lunatic asylum, in which he had been placed by his committee. Upon fresh indications of supposed insanity, a new commission, issued in 1833, under which

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(1) See Shelford, p. 179 to 204, and the numerous cases cited, not elsewhere reported. 1 Collinson, 274, *et seq.*

(2) 2 R. S., 53, § 8, 9, 10.

(3) *Ex parte Stanley*, 2 Vesey, Sen., 25.

(4) 1 Collinson, 324.

he was again found a lunatic, and a committee re-appointed. A *supersedeas* was granted upon this commission, in February, 1834, and in May, 1834, a third commission was issued, under which, the jury promptly found him of sound mind.

Sometimes the court will only suspend the commission for a certain period, instead of superseding it, to give time to see if the party has perfectly recovered, he having often relapsed. In such a case, the party is allowed to have the custody of his estate, the powers of the committee being suspended merely.(1)

No part of the jurisdiction in lunacy, requires greater caution than that of determining when a commission shall be superseded, for, although a safe conclusion may be arrived at upon evidence, in establishing lunacy, it is very difficult to determine when the mind is restored; depending upon the circumstance, whether the party has been led to these topics upon which his mind was affected.(2)

SECTION III.

SALE, &C., OF THE REAL ESTATE OF LUNATICS.

1 Sale for debts. Whenever the personal estate of any idiot, lunatic, or other person specified in the act, shall not be sufficient for the discharge of his debts, it shall be the duty of the committee of his estate to apply by petition to the court by which they were appointed, praying for authority to mortgage, lease, or sell, so much of the real estate of such idiot, lunatic, or other person, as shall be necessary for the payment of such debts: the said petition shall set forth the particulars and amount of the estate, real and personal of such idiot, lunatic, or other person, the application which may have been made of any personal estate, and an account of the debts and demands against such estate.

On the presenting of such petition, it shall be referred to a master in chancery, or to the clerk of the court, to inquire into

(1) *Ex parte Ferrars*, Mosely, 332. *Ex parte Turner*, Jacobs' Rep., 404.

(2) *Ex parte Holyland*, 11 Vesey, 10.

and report upon the matters therein contained, whose duty it shall be to examine into the truth of the representations made, to hear all parties interested in such real estate, and to report thereon with all convenient speed.

If, upon the coming in of the report and an examination of the matter, it shall appear to the court that the personal estate of the idiot, or other person above specified, is not sufficient for the payment of his debts, and that the same has been applied to that purpose as far as the circumstances of the case rendered proper, an order shall be entered, directing the mortgage, leasing, or sale of the whole, or such part of the said real estate as may be necessary to discharge the said debts.

The court may require any additional security to be given by any such committee, for the faithful application and accounting for the proceeds of such mortgage, lease, or sale, and may require an account thereof to be rendered from time to time.

In the application of any moneys raised by any such mortgage, lease, or sale, the committee shall pay all debts in an equal proportion, without giving any preference to such as are founded on sealed instruments.

It is first to be noticed, that the application to the court must be by petition, as the statute directs. No other mode can be adopted. Notice of its presentation must be given to the heir at law, and next of kin. See the form, Appendix, No. 341.

It seems also absolutely necessary, that a reference to a master should be directed, however clear the case may be upon the petition and documents.(1) There was no such provision in the act of 1813, (1 R. L., 147.) See the order, Appendix, No. 342.

These provisions as to selling real estate for payment of debts, were first adopted in England, in the statute 43 Geo. III. c. 75. Prior to that act, the court had no authority in the matter.(2)

Lord Eldon considered that he had discretion under the English statute to sell or not, as should be most for the benefit of the lunatic.(3)

I presume that by our act, if the personalty is proven insuffi-

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(1) 2 R. S., 54, § 12.

(2) *Ex parte Smith*, 5 Vesey, 556. *Ex parte Dykes*, 8 Vesey, 79.

(3) *Ex parte Phillips*, 19 Vesey, 124.

cient, the court must grant the order,(1) and a creditor could by application against the committee, compel him to do what the statute declares to be his duty. In the case of *The Executors of Brasher* v. *Van Cortlandt*, 2 Johns. Ch. Rep., 242. 400, a sale was obtained under a bill filed by a creditor. Some expressions of the chancellor, have led to the supposition, that a creditor might petition under the statute. It would at least be most prudent, to apply for an order, directing the committee to petition, or be removed. The 12th section, requiring a reference to a master, and the 13th showing that the court is to be satisfied upon the coming in of the report, (all new provisions,) appear to restrict the jurisdiction to the case of a petition by the committee. See also, 2 Paige, 597. For the form of a master's report, see Appendix, No. 343.

This report, I apprehend, ought to be regularly confirmed, and a petition presented for an order directing the mortgaging, leasing, or sale of the property specified in the report, to discharge the debts. See the petition and order, Appendix, No. 344.

The committee having made the sale, reports it with the name of the purchaser and terms, to the court; upon which an order that he execute a conveyance is made. See Appendix, No. 345. And for the form of the deed, Appendix, No. 346.

2 Sale for support of infants.

Where the personal property, and the rents, profits, and income of the real estate of any such idiot, lunatic, or other person above specified, shall be insufficient for his maintenance, or that of his family, or for the education of his children, a similar application may be made by the committee to the chancellor, or to the court having jurisdiction for authority, to mortgage, or sell the whole, or so much of the real estate as shall be necessary for that purpose, upon which the same reference and proceedings shall be had, and a like order shall be entered, as herein before directed.

In the case last mentioned, the court shall direct the manner in which the proceeds of such sale shall be secured, and the income or produce thereof appropriated.(2)

The proceedings stated under the last head, to obtain a sale for payment of debts will be a sufficient guide.

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(1) In the matter of *Pettit*, 2 Paige, 597. (2) 2 R. S., 54, § 17.

3 General provisions.

The statute directs, that the court shall give such orders respecting the time and manner of any sale as shall be deemed proper; and no conveyance in pursuance of any such sale shall be executed, until the sale shall have been reported on the oath of the committee, and confirmed by the court directing the same.(1)

Every conveyance made under the order of the court, pursuant to the provisions of the act, shall be as valid and effectual as if the same had been executed by the idiot, or lunatic, when of sound mind.(2)

An inquisition taken abroad, will not justify an application for a sale of a lunatic's real estate lying in this state.(3)

In a late case before Lord Brougham, the master had reported, that it would be advantageous to raise a sum of money on mortgage of the estate of the lunatic, which was one for life, to be applied in payment of the incumbrances and of his debts, and recommended that the eldest son should be at liberty to purchase an annuity on the life of his father, to be secured to the son, his executors, &c., during the life of the father, and charged on part of the estates; and that, subject to this annuity, and to a mortgage directed to be made, to be executed by the eldest son to the persons advancing the money, that the estates should be again settled in the manner they were before. This was ordered, and it was also ordered, that application be made to parliament for the purpose.(4)

The real estate of a lunatic cannot be sold, until not merely the income, but the capital of the personalty has been exhausted in his support, or at least, until the court can see that it must, in the natural course of events, be exhausted.(5)

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(1) 2 R. S., 54, § 18. (2) Ibid. § 21.
(3) Matter of *Perkins*, 2 Johns. Ch. Rep., 174.
(4) *In re Frank*, 1832. Shelford, 370.
(5) In the matter of *Pettit*, 2 Paige, 598.

SECTION IV.

LUNATIC TRUSTEE, AND ENFORCEMENT OF CONTRACTS.

Whenever any idiot, or lunatic, shall be seised, or possessed of any real estate, by way of mortgage, or as a trustee for others in any manner, his committee may apply to the court of chancery, for authority to convey and assure such real estate, to any other person or persons entitled to such conveyance or assurance, in such manner as the said court shall direct; upon which a reference, and the like proceedings shall be had, as in the case of an application to sell real estate; and the court, upon hearing all the parties interested, may order such conveyance or assurance to be made.(1)

On the application of any person entitled to such conveyance or assurance, by bill or petition, the committee may be compelled by the court of chancery, on a hearing of all parties interested, to execute such conveyance or assurance.(2)

The practice must be the same as upon an application to sell real estate, (ante, p. 264.) In other particulars, where the statute is silent, the course under the act relative to infant trustees, will be applicable.

The specific performance of a contract made by a lunatic, when of sound mind, may be decreed by the court, and the committee ordered to execute all necessary conveyances for that purpose.(3)

The summary proceedings under this statute, are not to be adopted in all cases. A bill may still be resorted to, if the case appears to require it. So the court will direct a bill to be filed, where, since the length of time since the creation or last declaration of the trust, the title of the claimant may appear to require deliberate investigation in the presence of the parties interested.(4)

After the death of a lunatic, it appears that the jurisdiction of the lord chancellor in England, sitting in lunacy ceases for

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(1) 2 R. S., 55, § 19.
(2) Ibid. § 20.
(3) 2 R. S., 55, § 22.
(4) Shelford, 379.

most purposes. He cannot make an order to try who are heirs at law of the lunatic, nor for distribution to the next of kin. A bill in chancery must usually be filed.(1)

Persons who have claims upon the estate of the lunatic, under the control of the committee, must apply to this court by petition, to enforce the claim. He will not be permitted to sue at law, except with the express sanction of the court.(2)

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(1) *Dutchess of Norfolk's* case, Jacobs, 593. *Wigg* v. *Tiler*, 2 Dick. 552. *Ex parte Gilbert*, 1 B. & B. 297. *Grosvenor* v. *Drar*, 2 Knapp, 82. The proceedings in the court below are fully stated in Shelford, p. 215.

(2) In the matter of *Heller*, 2 Paige, 200. In the matter of *Hopper*, 5 Paige, 489.

SECTION

A.

LUNATIC TRUSTEE, AND EN

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effect of that act was, to compel an in-
every case, except where proceedings before
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statute, may teach some useful lessons.

On t of New-York, there were brought into the courts
or as der that act, nine causes. Of these, three were tried.
pell three or four issues were settled, and none tried.
te m the frame of the act, every lawyer saw, that to get
ne ready, was but the commencement of delay and diffi-
, and hence expense. In fact, the statute amounted almost
suspension of the collection of testimony, in new causes,
the period of one year.

It was repealed at the ensuing session of 1839, and almost by acclaim. Another statute has been adopted, the provisions of which, it is believed, will be found practical and beneficial.

Some remarks, upon the system of taking testimony in courts of equity, may not be inappropriate.

The abolition of secret examinations in our state, has not produced those evils which were anticipated by many wise judges; or, at any rate, the judicious rules of practice adopted, have, to a great extent, obviated them. On the other side, signal advantages have resulted from the publicity of the investigation.

I have no doubt, that the present system, so far as the eliciting the truth of a case is the object, is preferable to an investigation before a jury. With the attendance of vigilant counsel, the objections arising from the want of marking the conduct of witnesses, are but shadowy, and amply overbalanced by the caution and deliberation with which questions are proposed, and answers put down.

The best possible system, could it be obtained, is that pur- in some of the French tribunals, where the witnesses are ed before the judge who is to decide, upon a schedule of 'ories, with liberty to add others on the spot, as per- 'e judge, and the answers are taken down by him, or ıt clerk. This system is, to a great extent, adopted ıles relating to an examination before a vice-chancellor. ı, the situation of our courts of equity, and the rooted ha- ıs of the profession, prevent this course. The next best mode, in my opinion, for reaching the truth is, the one now pursued.

It must be admitted, that the price paid for it is heavy, in great delay, and considerable expense. Great efforts have been made by chancellor Walworth, to lessen these evils. Should the officer be required to have a preliminary meeting at which the pleadings should be furnished, and the points in issue well discussed, something more might be accomplished. I believe, also, that by requiring a schedule of direct interrogatories to be furnished, on which to lay the foundation of the examination, some delay would be avoided, and precision more certainly attained.

1 Examination before an examiner.

The act referred to, of May 2, 1839, authorized the court to direct an issue, when it was deemed proper, if applied for by either party, within such time as the court should by general rule prescribe. Under this, the 67th rule has been so amended, as to warrant the application for an issue within 20 days after the replication is filed, or the cause is in readiness to take testimony against all the defendants. See further as to this, *post*, subdivision 2.

The act, (§ 6,) directs, that if an issue shall not have been applied for within the time prescribed by the rules of the court, or where such issue has been applied for and refused, or where the party, on whose motion the order to form an issue was obtained, shall have waived the order, the parties may proceed to take the proofs before an examiner or a commissioner, according to the former practice of the court, or to such general rules as the chancellor may prescribe for the purpose.

2 Application for an issue.

The statute of 1838, (§ 2,) directs, that when a cause pending in the court of chancery is at issue, upon a replication to the plea or answer of all or any of the defendants, and in readiness to take testimony therein, the complainant, or any defend-

ant to whose answer or plea a replication has been filed, may, within such time, and under such regulations as the chancellor shall prescribe, apply to the chancellor, or vice-chancellor, before whom the suit is pending, for an issue or issues, to try the matters of fact in dispute between the parties, by a jury, before a circuit court, a court of common pleas, mayor's courts, or the superior court of the city of New-York.

To this section, part of the 67th rule applies, as follows: That where the complainant, or any of the defendants, as to whose plea or answer a replication has been filed, desires an examination of witnesses in the presence of the vice-chancellor, or in open court at the hearing, or, if he wishes for an issue to try the facts in dispute by a jury, he may, within twenty days after the replication put in, or the cause is in readiness against all the defendants, give notice of an application to the court for that purpose, for the first regular motion day in term or vacation, after due notice of such application can be given; but the order cannot be granted until the cause is in readiness for hearing, or to take testimony against all of the defendants.

Notice of the application must be given to the several parties who have a right to take testimony in the cause.

To enable a defendant to give such notice to his co-defendants, where they appear by a different solicitor, the complainant's solicitor, as soon as the cause is in readiness to take testimony, shall give notice thereof to each defendant, to whose plea or answer he has filed a replication, stating in such notice the names of the other defendants who have a right to take testimony in the cause, and the solicitor by whom they respectively appear; and the defendant shall have twenty days thereafter to give notice of his application.(1) For the notice to be given by the complainant, see Appendix, No. 347.

The party making the application, shall furnish the court with a brief abstract of the matters of fact in issue between him and the adverse party, not exceeding five folios in any case; and either party may read or refer to the pleadings of any of the parties, who are entitled to take testimony in the cause.(2)

If the chancellor, or vice-chancellor, before whom such application is made, shall be of the opinion that the case is proper

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(1) Rule 67. (2) Ibid.

to be tried by a jury, and that the proceeding in the suit will be expedited, or the costs diminished, or that it will be more conducive to the ends of justice that such trial be had thereon, he shall award such issue; or, he may, in his discretion, direct the testimony to be taken in open court at the hearing of the cause, or before an examiner or commissioner, according to the practice of the court of chancery, previous to the passage of the act hereby repealed.

The chancellor, or vice-chancellor, before whom the application is made, in case such issue is awarded, shall prescribe a short and convenient form, containing the issue or issues to be tried by the jury, stating the same either by way of interrogatory or otherwise; or, he may refer it to a master to settle the form of the issues, subject to the supervision of the court; and such chancellor, or vice-chancellor, may give such further directions as he may deem necessary as to the time and manner of trying the issues, the reading of the answers, or other papers in evidence, the examination of parties as witnesses in behalf of other parties, or as to any other matter connected with the trial of the issues as has been heretofore usual in relation to feigned issues directed by the court of chancery, or as he in his discretion may deem important.

Where a trial by a jury is awarded, if the form of the issue is settled by the court, the order for such trial shall state the several questions to be passed upon by the jury, and the names of the parties to the issue, and which party is to be considered as holding the affirmative upon each question to be tried.(1) See the form of the order, Appendix, No. 348.

3 Appeals.

An appeal from any decision or order made by the chancellor, or vice-chancellor, either in awarding or refusing an issue, shall not stay proceedings in the cause pending the appeal, unless specially directed by the chancellor, or vice-chancellor, before whom the cause is pending.(2)

If it is referred to a master to settle the form of the issue or issues, he shall settle the same in the form of interrogatories, to be answered by the verdict of the jury. Such interrogatories shall be stated at length in the report, and he shall also state which party is to be considered as holding the affirmative of

(1) Rule 67.

(2) Law, 1839, § 3.

each question, or issue, upon the trial. See the form of the Order of Reference to the Master, Appendix, No. 349, and of the Report and Interrogatories, No. 350.

Upon the filing of a certified copy of such order when settled by the court, or of the order of reference and master's report after it has become absolute, or been confirmed if excepted to, with the clerk of the circuit court, or other court before which the trial is directed to be had, the said court shall be deemed to be fully possessed of the cause for the trial thereof, in the same manner as if a formal record of a feigned issue had been made up and sent into such court to be tried. Either party may give notice and bring on the trial, unless the trial is put off by the court upon sufficient cause shown, as in other cases; and, if the party holding the affirmative of such issue fails to appear, or to give evidence in support thereof, a verdict may be taken in favor of the adverse party. And a copy of the minutes of the court, containing the verdict of the jury upon such issues, certified by the clerk, shall, upon the hearing in this court, be sufficient evidence of the trial and verdict.

The court, in its discretion, may award an issue at any time, provided notice of the application has been given before any witnesses have been examined, and before an order to produce proofs has been entered and served.(1)

No. 2.

EXAMINATION TO CREDIT.

THE practice, as stated in page 489 of Volume I., has been changed. In *Sears* v. ———, November 3, 1835, the chancellor decided that examinations to credit must be made during the running of the rule to produce witnesses. If there were special reasons why this was not done, (as where a commission was returned afterward, and the witness to be discredited had been examined under it,) the court should be applied to to open the proofs, and for time to examine—that articles were unnecessary.

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(1) Rule 68.

DOCUMENTARY EVIDENCE.

By the 17th rule, as amended, May, 1839, where any deed, or other instrument in writing, which is duly acknowledged or proven in such manner as to authorize it to be read in evidence is stated in the bill, or where any judgment or other matter of record is set out, or distinctly stated in the bill, such deed or instrument, or an authenticated copy of the record, may be read upon the hearing of the cause upon bill and answer, unless the defendant in his answer denies the due execution of such deed or instrument, or the existence of such record, either positively, or according to his belief.

And, in the case of *Pardee* v. *De Calla*, in chancery, 6th March, 1838, it was decided, that the exemplification of a judgment, or of an execution, or of other matters of record distinctly referred to and stated in the bill, may be read in evidence upon the hearing on pleadings and proofs, although it was not made an exhibit before the examiner, and no notice of the intention to use it on the hearing had been given. (See the case cited, in a note to Rule 75, ed., 1839.)

No. 3.

Page 142, *Vol.* 2. *Before the 9th subdivision.*

Foreclosure suits, in the fourth class, are entitled to priority over all other suits in that class, unless the defendant, before the cause is heard, shall file with the register, assistant-register, or clerk, at the place where the court is held, an affidavit that he has a good and meritorious defence, and that his answer was not put in for the purpose of delay; the filing of which affidavit he shall have noted on the calendar. (Rule 91.)

No. 4.

Page 147. *Subdivision*, 15.

It is not necessary to wait until after the sale, before taxing the costs, and enrolling the decree. The costs may be noticed for taxation immediately after the decree, giving the same notice as it required upon service of a summons, (5 Paige, 526,)

and the decree can be enrolled at any time, after thirty days from its being entered.

No. 5.

Page 149. *Conclusion of the first paragraph.*

If no objections are filed to the draft of the report, it cannot be excepted to; and in such case the motion can be made upon the report before it is confirmed.

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